TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 195.

THE CALHOUN GOLD MINING COMPANY, PLAINTIFF IN ERROR,

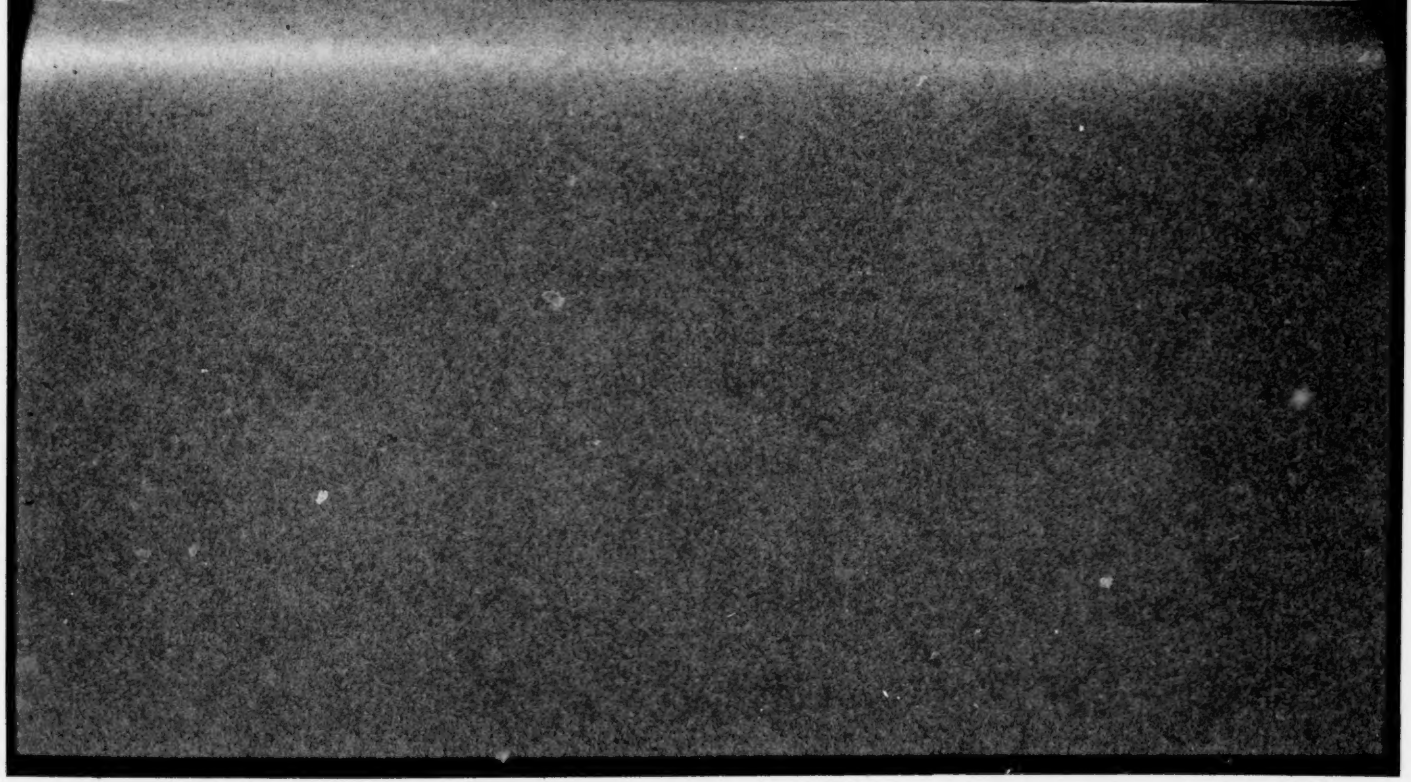
vs.

THE AJAX GOLD MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED FEBRUARY 1, 1900.

(17,628.)



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IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1 In the Supreme Court of the State of Colorado.

THE CALHOUN GOLD MINING COMPANY, Appellant,
vs.
THE AJAX GOLD MINING COMPANY, Appellee.
No. 3954. Petition.

To the Honorable John Campbell, chief justice of said supreme court:

Comes now the above-named appellant, The Calhoun Gold Mining Company, petitioner, by its attorney, W. E. So Relle, and complains that in the record and proceedings, and also in the rendition of the judgment in said suit in the supreme court of the State of Colorado, being the court of last resort of the said State in which a decision could be had in said suit and in which a final judgment was rendered against your petitioner on the 20th day of November, A. D. 1899, and wherein your petitioner claims certain rights under the laws of the United States, and which said rights were denied your petitioner, all of which appears in the records and proceedings in said suit, manifest error hath happened, to the great damage of your petitioner, the said The Calhoun Gold Mining Company, and your petitioner respectfully shows unto your honor:

First. That the amount involved in this controversy, exclusive of costs and interest, exceeds the sum of two thousand ($2,000) dollars.

Second. That on the 18th day of March, A. D. 1897, the
2 Ajax Gold Mining Company, the above-named appellee, plaintiff below, commenced this action by filing its complaint in the district court of El Paso county, Colorado, and that thereafter and on, to wit, the 21st day of March, A. D. 1897, summons was served upon your petitioner, defendant below, The Calhoun Gold Mining Company, in Arapahoe county, Colorado; that thereafter and on, to wit, the 19th day of April, A. D. 1897, and before the defendant was required by the laws of the State of Colorado "to answer or plead to the declaration or complaint of the plaintiff," your petitioner filed its petition and bond for the removal of this cause into the circuit court of the United States for the district of Colorado, upon the ground that several Federal questions were involved and would be involved in the trial and determination of this cause; that thereafter and on, to wit, the 28th day of May, A. D. 1897, the said petition for the removal of this cause to the United States circuit court was denied, and thereupon your petitioner duly excepted.

Third. That in the assignment of errors filed with the transcript of record in said cause in the office of the clerk of the supreme court of Colorado your petitioner assigned as error the order of the lower court denying the said petition to remove the said cause to the said circuit court of the United States.

Fourth. That in the trial and determination of this cause in the *nisi prius* court and also in the said supreme court there *were* necessarily involved the construction of several sections of the Revised

Statutes of the United States, to wit, sections Nos. 2320, 2322, 2323, and 2336, as will more fully appear by reference to the record in this cause and also by reference to the decision of the said
3 supreme court, rendered on the said 20th day of November, A. D. 1899.

Fifth. That the Federal questions involved in this cause and the rights claimed by your petitioner and which have been denied by the said supreme court are as follows, to wit:

1. That your petitioner, as the owner of the Victor Consolidated Lode mining claim, under section 2336 of the Revised Statutes of the United States, claimed the right of possession of the vein of its said Victor Consolidated claim within the exterior boundaries of and across the Monarch, Mammoth Pearl, and Apex claims of appellee, save at the points of intersection of the veins, and that said right was denied your petitioner by the lower court and by the said supreme court.

2. That your petitioner, as the owner of the Ithaca Tunnel mining claim, located by your petitioner and its grantors under section 2323 of the Revised Statutes of the United States, claimed, under said section 2323, the right of way for said Ithaca tunnel through and across the Monarch, Mammoth Pearl, and Apex Lode mining claims of the appellee, and that said right was denied your petitioner by the said supreme court.

3. That your petitioner, as the owner of the said Ithaca Tunnel site and mining claim, under section 2323 of the Revised Statutes of the United States, claimed the right of possession of all veins or lodes within three thousand (3,000) feet from the face of said tunnel on the line thereof, not previously known to exist, discovered in such tunnel within the exterior boundaries of the said Monarch, Mammoth Pearl, and Apex Lode mining claim-, which last said locations were claimed by the appellee to be prior to the location
4 of said tunnel; that said right was denied your petitioner by the said supreme court.

4. That your petitioner in this cause in the court below, under section 2323, Revised Statutes of the United States, as owner of the said Ithaca tunnel, claimed the right to prove and offered to prove that there was no "discovery of the vein or lode within the limits of the claim located" by appellee, to wit, the Monarch and Mammoth Pearl claims, prior to the location and commencement of the said Ithaca tunnel by your petitioner and its grantors; that said right was denied your petitioner by both the *nisi prius* court and by the said supreme court.

Wherefore your petitioner, having prepared and filed herewith its assignment of errors, prays for the allowance of a writ of error removing this cause to the Supreme Court of the United States, and that you sign the citation and fix the amount of the bond to be given by your petitioner, and for such other process as may seem meet and proper unto your honor.

W. E. SO RELLE,
Attorney for Petitioner, The Calhoun Gold Mining Company.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Ida M. Loftus, being first duly sworn, on oath states that she is the assistant secretary of The Calhoun Gold Mining Company, the above-named petitioner; that she has read the foregoing petition and knows the contents thereof, and that the same is true to the best of her knowledge and belief.

IDA M. LOFTUS.

Subscribed and sworn to before me this 29th day of December, A. D. 1899.

My commission expires Jan. 20, 1903.

[Seal of Paul W. Henrich, Notary Public, Arapahoe County, Colo.]

PAUL W. HENRICH,
Notary Public.

5 [Endorsed:] Supreme court of the State of Colorado. The Calhoun Gold Mining Co., appellant, *vs.* The Ajax Gold Mining Co., appellee. Petition. Petition granted, writ of error allowed, citation signed, and bond of plaintiff in error fixed at $1,000.00 on this 4th day of Jan., A. D. 1900. John Campbell, chief justice. Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

6 In the Supreme Court of the State of Colorado.

THE CALHOUN GOLD MINING COMPANY, Appellant,
vs.
THE AJAX GOLD MINING COMPANY, Appellee. } Order.

To Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, Greeting:

In the above-entitled cause judgment was rendered against the above-named appellant, The Calhoun Gold Mining Company, on the 20th day of November, A. D. 1899, and in the hearing and determination of said cause there were involved several Federal questions, and certain rights under the statutes of the United States were claimed by the said appellant and denied by this court; and now, on this 4th day of January, A. D. 1900, the said The Calhoun Gold Mining Company, by its attorney, W. E. So Relle, has filed its petition, praying the allowance of a writ of error removing this cause to the Supreme Court of the United States for further proceedings, and having duly considered said petition, it is considered that a writ of error should be allowed. You are, therefore, commanded to prepare and forward a writ of error wherein the said The Calhoun Gold Mining Company is plaintiff in error and the said The Ajax Gold Mining Company is defendant in error, and forward the same to me with all due haste.

7 Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, on this the fourth day of January, A. D. 1900, and of the Independence of the United

States the one hundred and twenty-fourth, at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Calhoun Gold Mining Company, appellant, and The Ajax Gold Mining Company, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or any authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Calhoun Gold Mining Company, as by its complaint appears, we, be-
9 ing willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 4th day of January, in the year of our Lord one thousand nine hundred.

Seal United States Circuit Court, District of Colorado.

ROBERT BAILEY,
Clerk of the Circuit Court of the United States for the District of Colorado,
By CHARLES W. BISHOP,
Deputy Clerk.

Allowed by—
JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

10 *Return.*

UNITED STATES OF AMERICA, }
District of Colorado, State of Colorado, } *ss:*

In obedience to the command of the above and foregoing writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the above-entitled cause, together with all things concerning the same.

Witness my hand and the seal of the supreme court of the State of Colorado, at Denver, in said State, this 27th day of January, A. D. 1900.

Seal Supreme Court, State of Colorado.

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By —— ——, *Deputy Clerk.*

11 [Endorsed:] Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

12 UNITED STATES OF AMERICA, *ss:*

To the Ajax Gold Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein The Calhoun Gold Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, this 4th day of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the 124th year, at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

A copy of the foregoing citation was delivered to me on the 5th day of January, A. D. 1900, and I hereby accept service thereof on behalf of the said defendant in error, The Ajax Gold Mining Company.

JOSEPH C. HELM,
Attorney for said Def. in Error.

13 [Endorsed:] Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

14 In the Supreme Court of the United States.

THE CALHOUN GOLD MINING COMPANY, Plaintiff in Error, *vs.* THE AJAX GOLD MINING COMPANY, Defendant in Error.	Error to the Supreme Court of the State of Colorado.

Assignment of Errors.

Comes now the said The Calhoun Gold Mining Company, plaintiff in error, by its attorney, W. E. So Relle, and says that the judgment of the supreme court of the State of Colorado in case No. 3954, wherein the said The Calhoun Gold Mining Company was appellant and the said The Ajax Gold Mining Company was appellee, should be reversed and be entered in favor of the plaintiff in error, and that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in deciding that plaintiff in error is not entitled to the right of possession of the vein of its Victor Consolidated Lode mining claim through and across the Monarch, Mammoth Pearl, and Apex Lode mining claims under section 2336 of the Revised Statutes of the United States.

Second. The court erred in denying to the plaintiff in error the right of way for its Ithaca tunnel, located under section 2323 of the Revised Statutes of the United States, through and across the Monarch, Mammoth Pearl, and Apex claims of defendant in error.

Third. The court erred in denying to the plaintiff in error, as the owner of the Ithaca Tunnel site and mining claim, located under and by virtue of section 2323 of the Revised Statutes of the United States, the right of possession of all veins or lodes within
15 three thousand (3,000) feet from the face of said tunnel on the line thereof, not previously known to exist, discovered in such tunnel, within the exterior boundaries of the said Monarch, Mammoth Pearl, and Apex Lode mining claims.

Fourth. The court erred in denying to the plaintiff in error, as the owner of the Ithaca Tunnel site and mining claim, located under section 2323 of the Revised Statutes of the United States, the right to prove that there was no discovery of any vein or lode within the limits of the claim located by appellee, to wit, the Monarch and Mammoth Pearl claims, prior to the location and commencement of the said Ithaca tunnel by the plaintiff in error and its grantors.

Fifth. The judgment of the court is for the defendant in error and against the plaintiff in error.

Sixth. That by the record it appears that the judgment was given for the defendant in error and against the plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said The Calhoun Gold Mining Company and against the said The Ajax Gold Mining Company, and the said The Calhoun Gold Mining Company, by its attorney, W. E. So Relle, prays that the judgment aforesaid may be reversed and that judgment be entered for plaintiff in error, or that the cause be remanded to the said the supreme court of the State of Colorado for further proceedings therein, and for the costs in this behalf paid, laid out, and expended.

W. E. SO RELLE,
Attorney for Plaintiff in Error.

16 [Endorsed:] Supreme Court of the United States of America. The Calhoun Gold Mining Co., plaintiff in error, *vs.* The Ajax Gold Mining Co., defendant in error. Assignment of errors. Filed in supreme court Jan. 4, 1900. H. G. Clark, clerk.

17 *Bond on Appeal.*

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, The Calhoun Gold Mining Co. and The Fidelity and Deposit Co. of Md., a corporation doing business under the laws of the State of Colorado, are held and firmly bound unto The Ajax Gold Mining Company in the full and just sum of one thousand dollars, to be paid to the said The Ajax Gold Mining Company, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of January, in the year of our Lord one thousand nine hundred.

Whereas lately, at the September term, A. D. 1899, of the supreme court of Colorado, sitting at Denver, in a suit pending in said court between The Calhoun Gold Mining Company, appellant, and The Ajax Gold Mining Company, appellee, judgment was rendered against the said The Calhoun Gold Mining Company, and the said The Calhoun Gold Mining Company having prayed and been allowed a writ of error to the supreme court of the State of Colorado to reverse the judgment of the said supreme court, and a citation directed to the said The Ajax Gold Mining Company, citing and admonishing it to be and appear in the Supreme Court of the United States, at Washington, D. C., 30 days from and after the date of said citation:

Now, the condition of the above obligation is such that if
18 the said The Calhoun Gold Mining Company shall prosecute said appeal to effect and answer all damages and costs if it

fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE CALHOUN GOLD MINING COMPANY, [SEAL.]
By W. E. SO RELLE, *Vice-President.*

[Rev. stamp.]

Attest: IDA M. LOFTUS,
Ass't Secretary.

[SEAL.] THE FIDELITY AND DEPOSIT CO. OF MD.,
By GUY LE R. STEVICK, [SEAL.]
Member of Local Board.

Attest: HERBERT W. ROBINSON,
For WILLIAM G. MAITLAND,
General Agent.

Sealed and delivered in the presence of—
——— ———.
——— ———.

Approved:
JOHN CAMPBELL,
Chief Justice.

STATE OF COLORADO, }
County of Arapahoe, } ss:

Guy Le R. Stevick, a member of the local board of directors of the Fidelity and Deposit Company of Maryland, the surety in the foregoing bond, and Herbert W. Robinson, agent, of the firm of Chapman & Maitland, the duly authorized agents of the said The Fidelity & Deposit Company of Maryland, being duly sworn, depose and say that the said surety company is a corporation of the State of Maryland, carrying on the business of a surety company in the State of Colorado; that said surety company has fully complied with
19 all of the laws of the State of Colorado relating to surety companies doing business in this State, and particularly has complied with the requirements and provisions of the act concerning surety companies approved March 31st, 1897; that affiants are, respectively, the officers and agents of the said company, as hereinbefore stated, and that as such officers and agents they are duly authorized to execute the bond hereto annexed on behalf of the said company; that said surety company is authorized by its articles of incorporation and its by-laws to execute the bond hereto annexed, and that said company has assets consisting of capital stock paid up in cash and surplus over and above all of its liabilities exceeding the sum of four million ($4,000,000) dollars.

GUY LE R. STEVICK.
HERBERT W. ROBINSON.

Subscribed and sworn to before me this 4th day of Jan'y, A. D. 1900.

My commission expires February 18th, 1901.

MAUDE L. SELVEY,
Notary Public.

[SEAL.]

Endorsed: No. 3954. Supreme Court of the United States. The Calhoun Gold Mining Co., appellant, *vs.* The Ajax Gold Mining Co., appellee. Bond on appeal, $1,000.00. Filed and approved in supreme court Jan. 4, 1900. Horace G. Clark, clerk.

20 UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
County of El Paso, }

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 11th day of January (it being the second Monday in January), A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry M. Blackmer, district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 18th day of March, A. D. 1897, there was filed in the office of the clerk of said court the complaint, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of the Fourth Judicial District, Sitting within and for said County.

21 THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant. } Complaint.

Now comes the plaintiff above named, The Ajax Gold Mining Company, and, complaining of the said defendant, The Calhoun Gold Mining Company, respectfully alleges and shows to this honorable court:

First. That it, the said The Ajax Gold Mining Company, and defendant, The Calhoun Gold Mining Company, are and at all times

hereinafter mentioned were corporations duly organized, existing, and carrying on business within the State of Colorado under and by virtue of the laws of said State in that behalf made and provided.

Second. That plaintiff is and for upwards of eighteen months last past has been the owner of the following-described lode claims or locations, to wit, the Monarch and the Mammoth Pearl, United States patent survey number 7913; the Apex, United States patent survey number 8178, and the Champion, United States patent survey number 9093, all of said lode mining claims being situate on Battle mountain, in Cripple Creek mining district, county of El Paso and State of Colorado, and being more particularly described by metes and bounds in the location certificates thereof, duly recorded in the office of the clerk and recorder of said county, and in the United States patents therefor heretofore issued by the United
22 States Government, and that during the said period of more than eighteen months last past plaintiff, as such owner, has been continuously in the possession of said premises, and has during all of that time been lawfully entitled to the exclusive, undisturbed, and peaceable possession and occupancy thereof.

Third. That on or about, to wit, the 1st day of May, A. D. 1896, defendant, without the knowledge or consent of plaintiff, wilfully and unlawfully broke and entered upon and into said premises under the south side line of the said Monarch claim, about 425 feet northerly from the southwest corner thereof, and at a great depth, to wit, about 100 feet below the surface, and between the said 1st day of May, A. D. 1896, and the beginning of this action wrongfully and unlawfully caused to be run and constructed therein an excavation, extending about north 20 degrees east, of great size, to wit, about 6 to 8 feet in height by about 4 to 6 feet in width and 900 feet in length, and dug, mined, removed, and converted to its own use large quantities of earth and mineral-bearing rock containing gold, silver, and other precious metals, the same being then and there the property of this plaintiff and of great value, to wit, $10,000.00, all to the damage and injury of plaintiff in large amount, to wit, the sum of $15,000.

Fourth. And plaintiff further alleges that defendant by means of an excavation under ground, beginning at a long distance from plaintiff's premises and connecting thereon below the surface with the said excavation aforesaid, is enabled to obtain access thereto and to re-enter said excavation upon plaintiff's premises without
23 the knowledge, let, or hindrance —, and is about to continue its unlawful invasion of plaintiff's premises and to further extend said excavation therein.

That in so wrongfully and unlawfully running and constructing said excavation upon said premises of plaintiff aforesaid defendant intersected and cut thereon numerous large veins and deposits of mineral-bearing earth, rock, and ores; that some of the veins and deposits so cut by defendant upon plaintiff's premises are rich and valuable, and by means of said underground excavation defendant can, without the knowledge of plaintiff, easily mine, extract, and re-

move the same, and that defendant is threatening to and is about to extract and remove such valuable ores and convert the same to its own use and benefit; that said premises of plaintiff derive their chief importance and value from said veins, lodes, and deposits of mineral ores, and the removal and conversion thereof by the defendant is a destruction *pro tanto* of plaintiff's property; that plaintiff has notified and commanded defendant to refrain from further trespassing upon plaintiff's premises and from extending said excavation further therein and from excavating or removing said ores therefrom; but that, disregarding said notices and wholly ignoring plaintiff's interests and rights, defendant threatens to and will, unless restrained by injunction from this honorable court, continue the removal and conversion of said ores and the perpetration of the other grave wrongs and injuries hereinbefore complained of, to the great and irreparable damage and injury of plaintiff, and that plaintiff has no plain, speedy, or adequate remedy at law whereby
24 it may protest its rights and avoid the destruction of its said property pending the trial and determination of this cause. Wherefore plaintiff prays:

1st. That summons issue from this honorable court commanding defendant to appear and answer fully unto the matters herein set forth.

2nd. That it have judgment against defendant for the damages already suffered, as aforesaid, in the sum of $15,000.

3rd. That pending the trial of this cause and the final determination thereof and the vindication of plaintiff's rights in the premises a temporary injunction issue from this honorable court restraining defendant, its officers, agents, and employees, from entering into the excavation above described upon plaintiff's premises, from further extending the same, and from extracting or removing any part or portion of the said mineral-bearing earth or rock aforesaid.

4th. That upon the final determination of this cause the said temporary injunction be made perpetual, forever forbidding defendant from the commission of the said wrongful acts and injuries to plaintiff.

5th. For the costs of this action and for such other and further relief as to this honorable court may seem meet and proper.

J. C. HELM AND
COLBURN & DUDLEY,
Attorneys for Plaintiff.

STATE OF COLORADO, } ss:
County of El Paso, }

Chas. H. Dudley, being duly sworn, on oath deposes and
25 says that he is — of the plaintiff above named, The Ajax Gold Mining Company; that he has read the foregoing complaint and knows the contents thereof, and that the facts stated in said complaint are true to the best knowledge and belief of affiant.

CHAS. H. DUDLEY.

Subscribed and sworn to before me this 18th day of March, 1897.
[SEAL.] EDGAR HOWBERT, *Clerk.*

Endorsed: No. 4870. District court, El Paso county. The Ajax Gold Mining Company, plaintiff, *v.* The Calhoun Gold Mining Company, defendant. Complaint. Filed in the district court of El Paso county, Colorado, Mar. 18, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy.

And thereafter and on, to wit, the 27th day of March, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

26 At this day comes the said plaintiff, by its attorneys, and defendant, also by its attorneys, and, on motion of plaintiff, defendant desiring further time to prepare its defense—

It is ordered that upon the giving by said plaintiff of a good and sufficient bond, conditioned in the penal sum of one thousand dollars, and with surety or sureties to be approved by the clerk of this court, a temporary writ of injunction may issue as prayed in the complaint, except that either plaintiff or defendant may enter the excavation described therein for the purpose of examining and surveying the same and preparing proof for the hearing of the injunction application, this injunction to remain in force till such hearing or until the further order of the court.

HORACE G. LUNT, *Judge.*

3 27th, 1897.

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

At this day, in open court, comes the said plaintiff, by J. C. Helm and Colburn and Dudley, its attorneys, and on its motion—

It is ordered by the court that the hearing on injunction herein be continued until the 12th day of April, A. D. 1897.

27 And thereupon and on, to wit, the same day, there was issued by the clerk of said court the writ of injunction, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of El Paso County, State of Colorado.

THE AJAX GOLD MINING COMPANY, Plaintiff, }
vs. } Injunction.
THE CALHOUN GOLD MINING COMPANY, Defendant. }

The People of the State of Colorado to the Calhoun Gold Mining Company send greeting:

The above-named plaintiff having filed its complaint in our district court against the above-named defendant, praying for an injunction against said defendant, requiring it to refrain from certain acts in said complaint and hereinafter more particularly mentioned, on reading the said complaint in this action, duly verified on oath by Chas. H. Dudley, secretary of said plaintiff, and it satisfactorily appearing to the Honorable Horace G. Lunt, judge of said court, therefrom that it is a proper case for an injunction, and that sufficient ground- exist therefor, and the necessary and proper undertaking having been given, we therefore, in consideration thereof and of the particular matters in said complaint set forth, do strictly command you and each and every of you that, until the further order of
28 said court, you and each of you, your and each of your servants, agents, attorneys, employés, and all persons acting under the control, authority, or direction of you or either of you, do absolutely refrain from and desist from entering into the excavation described in plaintiff's complaint, from further extending the same, and from extracting or removing any part or portion of the said mineral-bearing earth or rock mentioned in said complaint as exposed in said excavation, excepting that each of the parties hereto may make such surveys and examinations of said excavation or workings for the hearings and trial in this cause as they may desire.

Witness Hon. H. G. Lunt, one of the judges of said court, and the seal thereof, at Colorado Springs, Colo., aforesaid, this 27th day of March, A. D. 1897.

EDGAR HOWBERT, *Clerk*,
[SEAL.] By M. L. TAYLOR, *Deputy*.

STATE OF COLORADO, } ss:
County of Arapahoe, }

I do hereby certify that I have duly executed the within writ on this 31st day of March, A. D. 1897, by serving the Calhoun Gold Mining Company, by delivering to and leaving with James Quinn, Jr., secretary of the above-named company, personally, with a true copy of the within writ of injunction, all in said county of Arapahoe, State of Colorado.

E. H. WEBB, *Sheriff*,
By W. H. LOAR, *Deputy*.

Endorsed: No. 4870. District court, El Paso county. The Ajax G. M. Co., plaintiff, *vs.* The Calhoun G. M. Co., defendant. Injunction. Sheriff's fees: Service, .30; mileage, .70; total, 1.00. Filed in the district court of El Paso county, Colorado, May 1, 1897.
29 Edgar Howbert, clerk, by E. C. Davis, deputy. Colburn & Dudley & J. C. Helm, attorneys for plaintiff.

And thereafter and on, to wit, the 12th day of April, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm and Colburn and Dudley, its attorneys, and, on its motion—

It is ordered by the court that the hearing on injunction be continued until the 17th day of April, A. D. 1897.

And thereafter and on, to wit, the 19th day of April, A. D. 1897, there was filed in the office of the clerk of the said court the petition for removal, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court.

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Petition for Removal.

30 Your petitioner, The Calhoun Gold Mining Company, respectfully shows to this honorable court:

First. That it is the defendant in this suit, which is of a civil nature, and that the matter and value of the property in dispute in this cause exceeds the sum of two thousand dollars ($2,000.00), exclusive of interest and costs.

Second. That in the hearing and determination of this cause there will necessarily be involved several Federal questions and the construction of several of the statutes of the United States governing, providing for, and relating to the location and purchase of lode mining claims and tunnel sites.

Third. That among other controversies existing between plaintiff and defendant herein is one as to whether or not the acts done and performed by the defendant in its location of the tunnel site hereinafter described constitute it a valid, subsisting mining claim under the requirements of section number 2323 of the Revised Statutes of the United States.

Fourth. That upon the 19th day of August, A. D. 1895, this defendant and its grantors located the Ithica Tunnel site upon the unappropriated public mineral domain of the United States, and immediately thereafter and on, to wit, the 20th day of August, A. D. 1895, this defendant and its grantors marked the line of said tunnel with substantial posts and filed its location certificate in the office of the county clerk and recorder of El Paso county, Colorado; that the face of said tunnel and the line thereof, for a distance of several hundred feet from its face, at the time of said location, was upon
31 the unappropriated mineral domain of the United States, but that at a distance of about — feet from said face the said tunnel penetrated the side line of the said Monarch claim, and has been driven by this defendant entirely across the said Monarch claim and into the Mammoth Pearl claim described in the plaintiff's complaint; that the excavation described in plaintiff's complaint is the said tunnel; that said tunnel since its location has been driven with great diligence and continuously by this defendant, and that in the construction thereof several blind veins, which were not known to exist prior to the location of said tunnel site, have been discovered and exposed; that this defendant claims, while plaintiff denies, that each and every of said blind veins discovered in said tunnel, which were not known to exist prior to the location of said tunnel site, is the property of and owned by this defendant; that in determining this question a construction of section 2336 of the Revised Statutes of the United States will necessarily be involved.

Fifth. That a further question in the hearing and determination of this case will be involved, as follows, to wit: That defendant claims, while plaintiff denies, that the defendant has the right to drive said tunnel into and across the pretended claims of the plaintiff described in said complaint, and that in the determination of this question there will necessarily be involved a construction of section 2323 of the Revised Statutes of the United States.

32 Sixth. That in the hearing and determination of this cause the construction of section 2336 of the Revised Statutes of the United States must necessarily be involved for the following reason, to wit: That the defendant is the owner and in actual possession of that certain lode mining claim known as the Victor Consolidated, survey No. 8747, upon which a United States patent has been issued to the defendant; that said claim entirely crosses the Monarch and Mammoth Pearl Lode mining claims, described in the complaint and claimed by the plaintiff; that the patent of the Victor Consolidated claim is junior to the Monarch and Mammoth Pearl, and the conflicting surface is included in the last aforesaid patent; that the discovery vein of said Victor Consolidated claim is substantially parallel to the side lines and is continuous throughout the length of said Victor Consolidated claim, and crosses both end lines thereof, and is a cross-vein to the veins of the Monarch and Mammoth Pearl claims. By virtue of said section 2336 the defendant claims the right of possession and ownership of the vein of said Victor Consolidated claim within the side lines of the Monarch and Mammoth Pearl claims, save at the points of intersection of the veins, while plaintiff claims

every part and portion of said veins within the exterior boundaries of the Monarch and Mammoth Pearl claims; defendant constructed said tunnel and intersected the said vein of the Victor Consolidated claim within the exterior boundaries thereof at a point — feet from the face of said tunnel, at an expense of fifteen thousand dollars ($15,000.00), prior to any objection made by plaintiff. Defendant claims the right to work said claim and the vein thereof through said tunnel.

33 Seventh. That your petitioner desires to remove this suit before the trial or hearing thereof or before the hearing on an application for an injunction herein into the next circuit court of the United States to be held in the district of Colorado, and your petitioner offers herewith good and sufficient surety for its entering into said circuit court of the United States for the district of Colorado, on the first day of its next session, a copy of the records in this suit and for payment of all costs which may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully and improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the circuit court of the United States to be held in the district of Colorado pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court.

And he will ever pray.

W. E. SO RELLE,
Attorney for Petitioner.

STATE OF COLORADO, }
County of Arapahoe, } ss:

A. H. Weber, being duly sworn, on oath says that he is the vice-president of The Calhoun Gold Mining Company, the above-named petitioner; that the said The Calhoun Gold Mining Company is a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal office at the city of

34 Denver, in said county and State; that affiant has read the foregoing petition and knows the contents thereof, and that the same is true except as to the matters and things therein stated on information and belief, and as to those he believes the same to be true.

A. H. WEBER.

Subscribed and sworn to before me this 23rd day of March, A. D. 1897.

My commission expires Dec. 26, 1897.

NELLIE PRESTON,
[SEAL.] *Notary Public.*

I, Wiley E. So Relle, as attorney and counselor at law of the several courts of record of the State of Colorado, do hereby certify that as counsel for the above-named petitioner I have examined the proceed-

ings against it and carefully inquired into the matters set forth in its petition, and I believe the same are true.

W. E. SO RELLE,
Attorney for Petitioner.

Endorsed: No. 4870. The Ajax Gold Mining Company, plaintiff, *vs.* The Calhoun Gold Mining Company, defendant. Petition for removal. Filed in the district court of El Paso county, Colorado, Apr. 19, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy. Wiley E. So Relle, att'y for defendant, 511 Cooper bldg., Denver, Colo.

And thereafter and on, to wit, the 20th day of April, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

35 THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

At this day comes the said defendant, by its attorney, Wiley E. So Relle, Esq., and the said defendant having heretofore presented and filed *his* petition for the removal of this cause to the circuit court of the United States for the district of Colorado, and having also on the same day filed its bond for such removal, and the court having considered the same—

It is ordered by the court that the said petition and bond be, and they are hereby, approved, and that this action be, and the same hereby is, removed to the said circuit court, and let the clerk of this court make a transcript of the papers in this behalf, together with all orders had and entered of record herein, and certify the same to said circuit court of the United States for the district of Colorado with all convenient speed upon the payment of all costs remaining due in this action.

And thereafter and on, to wit, the 4th day of May, A. D. 1897, the same being one of the days of the regular January, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
36 THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

At this day it is ordered by the court that the order of the 20th day of April, 1897, entered in this cause, removing the same to the United States circuit court, be, and the same hereby is, vacated and set aside, the same having been inadvertently entered.

Pleas before Honorable Ira Harris, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of May (it being the second Monday in May), A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

Present: Hon. Ira Harris, judge aforesaid; Henry M. Blackmer, district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 17th day of May, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

37 THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day, in open court, comes the plaintiff, by its attorney, J. C. Helm, Esq.; and the defendant, by its attorney, W. E. So Relle, Esqr., also comes. Thereupon this cause *coming* on to be heard upon the petition of said defendant for the removal of this cause to the U. S. court, which is argued by counsel and submitted to the court and by the — taken under advisement.

And thereafter and on, to wit, the 28th day of May, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

This cause having been heretofore submitted to the court upon the petition of defendant for the removal of this cause to the United States court, the court, being now sufficiently advised in the premises, doth deny said petition; to which ruling of the court the defendant duly excepted.

And thereafter and on, to wit, the 12th day of June, A. D. 1897, the same being one of the days of the regular May, A. D.
38 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day, in open court, come the defendant, by its attorney, W. E. So Relle, Esq., and, upon his motion—

It is ordered by the court that the order heretofore made on the 28th day of May, 1897, be modified as follows: Time and until 15 days from (said 28th day of May, 1897) this day is allowed said defendant within which to plead or answer; and it is further ordered that time and until 10 days additional from said 28th day of May is allowed said defendant within which to plead or answer herein.

And thereafter and on, to wit, the 21st day of June, A. D. 1897, the same being one of the days of the regular May, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.
} Injunction.

At this day, in open court, comes the plaintiff, by its attorneys, Colburn and Dudley, Esqrs., and, upon their motion and by consent, it is ordered by the court that the plaintiff's motion to
39 vacate the order entered on the 12th day of June, 1897, be, and the same hereby is, sustained, and that the defendant have leave to withdraw the demurrer by it filed herein, and time and until the 26th day of June, 1897, is allowed said defendant within which to answer the complaint herein, and time and until August 1st, 1897, is allowed said plaintiff within which to plead to said answer.

And thereafter and on, to wit, the 28th day of June, A. D. 1897, there was filed in the office of the clerk of said court the answer, which is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of El Paso,

In the District Court of the 4th Judicial District, Sitting within and for said County.

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Answer.

Comes now the above-named defendant, The Calhoun Gold Mining Company, and for its answer in the above-entitled cause says:

First. Admits that plaintiff and defendant are corporations, as alleged in the complaint; admits that defendant caused the construc-

tion of the excavation described in plaintiff's complaint; admits that in constructing said excavation hereinafter called the Ithica tunnel it intersected and cut ten (10) large veins; admits
40 that United States patents for the surface ground described therein were issued to the plaintiff for the Monarch, Mammoth Pearl, Apex, and Champion lodes, mentioned in plaintiff's complaint. Defendant alleges that said patents were issued after the location of the Ithica tunnel hereinafter mentioned and before the discovery of any vein therein.

Second. Denies that plaintiff is entitled to the possession or occupancy of the said premises or any part or portion thereof; denies that said veins or any of them are the property of the plaintiff; denies that it constructed said excavation wrongfully or unlawfully; denies that it extracted, mined, removed, or converted any mineral-bearing rock containing gold or other valuable metals from any vein or veins belonging to the plaintiff; denies that plaintiff has been damaged in the sum of fifteen thousand ($15,000.00) dollars or in any other sum; denies that it has perpetrated any wrongs upon the plaintiff; denies that plaintiff has suffered or will suffer great or irreparable damage or any damage whatsoever by reason of the continuation of the said tunnel or the extraction of the ores from said veins; denies that plaintiff has no plain, speedy, or adequate remedy at law.

Third paragraph. Defendant alleges that at the time of the commencement and location of said Ithica tunnel there had never been discovered or exposed by the plaintiff, its grantors, or any other persons whatsoever, any vein, lode, ledge, deposit, or crevice bearing gold or other valuable minerals in rock in place in the discovery shaft or within the limits of either of said pretended Monarch, Mammoth Pearl, or Champion locations.

41 Fourth. Defendant alleges that on, to wit, the 19th day of August, A. D. 1895, the grantor of this defendant, A. H. Weber, who at that time was and ever since hath been a citizen of the United States, entered upon the unappropriated public mineral domain of the United States on Battle mountain, in the Cripple Creek mining district, El Paso county, Colorado, and located the Ithica Tunnel site or mining claim by posting a plain notice at the face of the said tunnel, which said notice comained the name of the locator, the date of location, and the general line or course of the said tunnel, specifying the place of commencement and the termination thereof, and that on the same date the said locator marked the line of the said tunnel upon the surface with substantial posts, one at the *the* place of commencement, one at the termination of the said tunnel, and one at each interval of one hundred (100) feet upon the said line; that on, to wit, the 20th day of August, A. D. 1895, the said locator filed in the office of the county clerk and recorder of said county a location certificate of the said tunnel mining claim, which said certificate contained the name of the locator or party interested therein, to wit, A. D. Weber; the date of location, to wit, the 19th day of August, A. D. 1895; the name of the claim, to wit, the Ithica Tunnel site; the number of feet claimed upon each vein discovered in said

tunnel, to wit, fifteen hundred (1,500); the place of commencement, termination, and the line of said tunnel as follows, to wit:

Beginning at the face of said tunnel, whence the S. ¼ cor. of sec. 29, T. 15 S., R. 69 W., bears S. 48 34′ E. 2,721.5, cor. No. 4, sur. No. 8747.

42 Victor Consolidated No. 2 lode bears S. 74 17′ E. 545.5 feet. Thence N. 10 W. 35 feet to a stake.

Thence N. 20 E. 2,965 feet to the north end of said tunnel; that said location certificate is found of record in the office of said county clerk in Book 212, on page 324.

Fifth. That the line of said tunnel runs diagonally across the said pretended lode mining claims mentioned in plaintiff's complaint, and crosses the side lines of each of said claims.

Sixth. That thereafter and on, to wit, the 20th day of August, A. D. 1895, the said locator granted and conveyed the said tunnel mining claim to this defendant, who then became, ever since hath been, and now is the owner thereof; that at all times since its incorporation the said defendant and each and every of its stockholders, *its stockholders* have been and now are citizens of the United States.

Seventh. That at all times after the said 20th day of August, A. D. 1895, and until restrained by order of this court, this defendant caused diligent and continuous work to be prosecuted in constructing a tunnel upon the line of the said Ithica Tunnel site, and that said tunnel is the excavation described in plaintiff's complaint; that it has reached a depth in the mountain of about fourteen hundred (1,400) feet from the face thereof, and that in the construction of the same the defendant has expended the sum of twenty thousand ($20,000) dollars; that at all times herein mentioned plaintiff knew that said tunnel was being constructed, and made no objection thereto until the same had reached a depth of about thirteen

43 hundred (1,300) feet and had cost this plaintiff fifteen thousand ($15,000.00) dollars; that said tunnel entered the south side line of the said Monarch Lode mining claim at a point about four hundred twenty-five (425) feet from the face thereof, and has been driven by said defendant entirely through and across the Monarch claim and into and almost across the said Mammoth Pearl, Apex, and Champion claims.

Eighth. That in the construction of the said tunnel defendant discovered therein the said ten (10) veins or lodes bearing gold and other valuable minerals in rock in place; that said lodes or veins and each of them are blind, do not appear upon the surface, and were not known to exist previous to the location of the said tunnel site; that no other veins or lodes were intersected in said tunnel; that upon the intersection and discovery of each of said lodes this defendant duly located the same in accordance with local customs, rules, and regulations of the miners in said mining district, the laws of the State of Colorado and of the United States.

(*a.*) That on the 19th day of September, A. D. 1895, said tunnel intersected the first of the said veins at a depth of one hundred thirty-eight (138) feet from the face of the said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted

at the face of said tunnel, where the same could be easily seen and examined, which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 1 Lode mining claim; the date of discovery, to wit, the 19th day of September, A. D. 1895; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and south-
44 easterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of the said lode, so that the same could be easily identified; that within ninety (90) days after the said date of discovery said defendant caused a duplicate copy of the said notice to be recorded in the office of the county clerk and recorder of El Paso county, Colorado.

(*b.*) That on the 27th day of September, A. D. 1895, said tunnel intersected a second vein at a depth of one hundred sixty-five (165) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of the said tunnel, where the same could be easily seen and examined, which said notice gives the said point of discovery within the tunnel, the name of the lode, to wit, the Ithica Tunnel No. 2 Lode mining claim; the date of discovery, to wit, the 27th day of September, A. D. 1895; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of the said lode, so that the same could be easily identified; that within ninety (90) days after the said date of discovery said defendant caused a duplicate copy of the said notice to be recorded in the office of the county clerk and recorder of El Paso county, Colorado; that on the — day of ——, A. D. 1897, the defendant filed in the office of the said county clerk and recorder an additional and amended location certificate of the said lode.

45 (*c.*) That on the 20th day of December, A. D. 1895, the said tunnel intersected a third vein at a depth of three hundred fifty-six (356) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of the said tunnel, where the same could be easily seen and examined, which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 3 Lode mining claim; the date of discovery, to wit, the 20th day of December, A. D. 1895; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that within ninety (90) days after the said date of discovery said defendant caused a duplicate copy of the said notice to be recorded in the office of the county clerk and recorder of El Paso county, Colorado.

(*d.*) That on the — day of ——, A. D. 1896, said tunnel intersected the fourth vein at a depth of four hundred twenty-five (425) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where

the same could be easily seen and examined, which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 4 Lode mining claim; the date of discovery, to wit, the — day of ——, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit,
46 northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of the said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery said defendant caused a good and valid location certificate of the said lode to be filed in the office of the county clerk and recorder; which said certificate contained the same facts in said notice; that on the — day of ——, A. D. 1897, the defendant filed in the office of the said county clerk and recorder an additional and amended location certificate of said lode.

(*e.*) That on the 1st day of August, A. D. 1896, said tunnel intersected the fifth vein at a depth of five hundred eighty-one (581) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 5 Lode mining claim; the date of discovery, to wit, the 1st day of August, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

47 (*f.*) That on the 16th day of August, A. D. 1896, said tunnel intersected the seventh vein at a depth of six hundred forty-three (643) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 6 Lode mining claim; the date of discovery, to wit, the 16th day of August, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk; which said certificate contained the same facts contained in the said notice.

(*g.*) That on the 22nd day of August, A. D. 1896, said tunnel intersected the seventh vein at a depth of six hundred eighty-one (681)

feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 7 Lode mining claim; the date of discovery, to wit, the 22nd day of August, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course
48 of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within — days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

(*h.*) That on the 16th day of October, A. D. 1896, said tunnel intersected the eighth vein at a depth of nine hundred twenty-seven (927) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice contained the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 8 Lode mining claim; the date of discovery, to wit, the 16th day of October, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty feet, and a description of said lode, so that the same could be easily identified; that thereafter and within 90 days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

(*i.*) That on the 28th day of October, A. D. 1896, said tunnel intersected the ninth vein at a depth of nine hundred sixty-one
49 (961) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice gives the said point of discovery, the name of the lode, to wit, the Ithica Tunnel No. 9 Lode mining claim; the date of discovery, to wit, the 28th day of October, A. D. 1896; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within 90 days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

(*j.*) That on the 5th day of January, A. D. 1897, said tunnel intersected the tenth vein at a depth of one thousand three hundred

seven (1,307) feet from the face of said tunnel, and immediately thereafter the said defendant caused a plain notice to be posted at the face of said tunnel, where the same could be easily seen and examined; which said notice contained the name of the lode, to wit, the Ithica Tunnel No. 10 Lode mining claim; the date of discovery, to wit, the 5th day of January, A. D. 1897; the name of the locator, to wit, the Calhoun Gold Mining Company; the general course of the vein, to wit, northwesterly and southeasterly; the extent claimed upon each side of said tunnel, to wit, seven hundred fifty (750) feet, and a description of said lode, so that the same could be easily identified; that thereafter and within 90 days from the said date of discovery said defendant caused a good and valid location certificate of said lode to be filed in the office of the said county clerk and recorder; which said certificate contained the same facts contained in said notice.

Ninth. Defendant alleges that during the year A. D. 1896 the defendant caused at least one hundred ($100.00) dollars' worth of work to be done for the development and improvement of each of said lodes; that from the point of the discovery of the said Ithica Tunnel No. 2 lode it has caused a drift upon the vein to be run northwesterly about one hundred (100) feet; that from said point of discovery upon the said Ithica Tunnel No. 9 lode it has run drifts and developed said vein for a distance of about one hundred (100) feet; that from the said last-mentioned lode said defendant has mined, extracted, and shipped ores of the value of $400 *dollars*, and defendant denies that it has mined, extracted, or shipped any other ores from said premises or any portion thereof. Defendant alleges, further, that as nearly as can be determined from present development the said lodes and each of them discovered in said tunnel extend across the said pretended claims described in plaintiff's complaint.

Tenth. Defendant alleges that at all times since the intersection of said veins in said tunnel it has been in the actual and continuous possession and occupation of the same; that the defendant is the owner of and is entitled to the possession of said veins and each of them, and defendant claims further, that said veins and each of them are excepted out of the said patents. Defendant claims the right of way through said tunnel for the purpose of mining, extracting, and shipping the ores from said veins, and defendant also claims the right to extend said tunnel upon the line thereof to the full extent of three thousand (3,000) feet from the face under the customs, rules, and regulations of miners in said mining district, the laws of the State of Colorado and of the United States.

For a second and separate answer to plaintiff's complaint, defendant says:

First. Admits that plaintiff and defendant are corporations, as alleged in the complaint; admits that defendant caused the construction of the excavation described in plaintiff's complaint; admits that in constructing said excavation, hereinafter called the Ithica tunnel, it intersected and cut numerous large veins; admits that United States patents for the surface ground described in the said

patents were issued to the plaintiff for the Monarch, Mammoth Pearl, Apex, and Champion lodes.

Second. Denies that plaintiff is entitled to the possession of the said premises or any part or portion thereof; denies that said veins or any of them are the property of the plaintiff; denies that it constructed said excavation wrongfully or unlawfully; denies that it extracted, mined, removed, or converted any of the ores contained in said veins, except as hereinafter expressly admitted; denies that plaintiff has been damaged in the sum of fifteen thousand
52 ($15,000.00) dollars or any other sum; denies that it has perpetrated any wrongs upon the plaintiff; denies that plaintiff has suffered or will suffer great or irreparable damage, or any damage whatsoever, by reason of the continuation of the said tunnel or the extraction of the ores from said veins; denies that plaintiff has no speedy or adequate remedy at law.

Third. Defendant alleges that it is the owner and in the actual occupation and possession of the Victor Consolidated Lode mining claim, U. S. patent survey No. 8747, situate on Battle mountain, in Cripple Creek mining district, El Paso county, Colorado, and upon which patent has heretofore been issued; that at the time of the location of said claim the grantors of this defendant had discovered and exposed in the discovery shaft thereof a strong, well-defined vein or lode bearing gold and other valuable metals in rock in place, and thereupon located the said Victor Consolidated claim, with its side lines as nearly parallel to the said vein as could be determined at that time from the developments; that the said vein is continuous throughout the entire length and crosses both end lines of the said Victor Consolidated claim; that the said Victor Consolidated claim and the vein of the Victor Consolidated claim extend entirely across the claims mentioned in plaintiff's complaint; that said Victor Consolidated vein of the Victor Consolidated claim is a cross-vein to the veins of the Monarch, Mammoth Pearl, Apex, and Champion claims mentioned in plaintiff's complaint; that the surface ground within the exterior boundaries of the Victor Consolidated claim, on each side of the claims mentioned in plaintiff's complaint, is included in the patent of the said Victor Consolidated
53 claim and is the property of this defendant. Defendant alleges that it is the owner and in the lawful possession and entitled to the possession of the said vein of the Victor Consolidated claim within the exterior boundaries of the claims mentioned in plaintiff's complaint, save at the points where the said Victor Consolidated vein intersects the veins of the said claims mentioned in plaintiff's complaint.

Fourth. Defendant alleges that on, to wit, the 19th day of Aug., A. D. 1895, the grantor of this defendant, A. H. Weber, who at that time was and ever since hath been a citizen of the United States, entered upon the unappropriated public mineral domain of the United States on Battle mountain, in the Cripple Creek mining district, El Paso county, Colorado, and located the Ithica Tunnel site; that at the point of commencement or face of said tunnel the said locator posted a plain notice, giving the name of the locator, the

date of location, and the general line of course of the said tunnel, specifying the place of commencement and the termination thereof, and that upon the same date said locator marked the line of said tunnel upon the surface with substantial posts, one at the place of commencement, one at the termination of the said tunnel, and one at each interval of one hundred (100) feet upon the line thereof; that on, to wit, the 20th day of August, A. D. 1895, said locator filed in the office of the county clerk and recorder of said county a location certificate of the said tunnel, giving the name of the locator or party interested therein, to wit, A. H. Weber; the date of location, to wit, the 19th day of August, A. D. 1895; the name of the claim, to wit, the Ithica Tunnel site or mining claim; the number of
54 feet claimed upon each vein discovered in said tunnel, to wit, fifteen hundred (1,500) feet; the place of commencement, termination, and the line of said tunnel as follows, to wit:

Beginning at the face of said tunnel, whence the S. ¼ cor. of sec. 29, T. 15 S., R. 69 W., bears S. 48 34′ E. 2,721.5, cor. No. 4, sur. No. 8747.

Victor Consolidated No. 2 lode bears S. 74 17′ E. 545.5 feet.

Thence N. 10 W. 35 feet to a stake.

Thence N. 20 E. 2,965 feet to the north end of said tunnel.

That said location certificate is found of record in the office of the said county clerk and recorder, in Book 212, on page 324; that the line of said tunnel entered the west side line of said Victor Consolidated claim at a point about eight hundred fifty (850) feet from the face of said tunnel and passes diagonally across said claim and crosses the east side line thereof at a point about fourteen hundred twenty-five feet (1,425) from the face thereof.

Fifth. That thereafter and on, to wit, the 20th day of August, A. D. 1895, the said locator granted and conveyed the said tunnel site to this defendant, who then became, ever since hath been, and now is the owner thereof; that at all times thereafter, until restrained by order of this court, this defendant has prosecuted work diligently and continuously in running the tunnel upon the line of said tunnel site for the development of the veins or lodes of the said Victor Consolidated claim and for the discovery of mines; that said tunnel is the excavation described in plaintiff's complaint; that it has
55 reached a depth in the mountain of about fourteen hundred (1,400) feet from the face thereof, and that in the construction thereof the defendant has expended the sum of twenty thousand ($20,000.00) dollars; that at all times herein mentioned plaintiff knew that said tunnel was being constructed and made no objection thereto until the same had reached a depth of thirteen hundred (1,300) feet from the face and had cost this plaintiff fifteen thousand ($15,000.00) dollars.

Sixth. That the said tunnel within the side lines of the Victor Consolidated claim intersects two (2) veins, the first at a depth of nine hundred twenty-seven (927) feet, and the second at a depth of nine hundred sixty-one (961) feet from the face thereof; that the said lodes or veins have the same general characteristics and bear evidences of uniting and becoming one and the same vein; that said

vein or veins bear the same general characteristics to the said vein discovered and exposed in the discovery shaft of the said Victor Consolidated claim, and defendant alleges that said veins or lodes are one and the same vein, and that it extends entirely across the claims mentioned in plaintiff's complaint and into and underneath the surface ground included in the said patent of the Victor Consolidated claim on each side of claims claimed by plaintiff.

Seventh. Defendant denies that it has extracted, mined, removed, or converted any mineral-bearing rock containing gold or other valuable metals from the said premises or any part or portion thereof save from the said vein intersected in said tunnel at nine
56 hundred sixty-one (961) feet from the face thereof; that upon said vein the said defendant has drifted for about one hundred (100) feet, and has mined and extracted ores of the value of $400 *dollars* and no more. Defendant alleges that it was diligently prosecuting work upon the vein or veins of the Victor Consolidated claim with a view of developing the same at the time the said restraining order was issued by this court, and defendant further alleges that it is desirous of continuing the development of the same throughout its length, and is desirous of working, mining, and extracting the ores from said vein through said tunnel; defendant alleges that it has been damaged in the sum of ten thousand ($10,000.00) dollars by reason of the restraining order heretofore issued in this cause.

Eighth. Defendant claims the right of way through said tunnel to work and mine the veins of the said Victor Consolidated claim under the local customs, rules, and regulations of the miners in said mining district, the laws of the State of Colorado and of the United States. The plaintiff watched the construction of said tunnel in silence, thinking that it would some day reap the harvest of defendant's energies. Now, that plaintiff has watched and waited and remained silent when conscience required it to speak, it should not be permitted to speak now that conscience requires it to be dumb.

Wherefore defendant prays:

1st. That the said restraining order heretofore issued in this cause be dissolved and held for naught.

2nd. For judgment against plaintiff for damages in the sum of ten thousand ($10,000.00) dollars.

57 3rd. For the costs of this action and for such other and further relief as to this honorable court may seem meet and proper.

W. E. SO RELLE,
Attorney for Defendant.

STATE OF COLORADO, } ss.:
County of Arapahoe, }

A. H. Weber, being duly sworn, deposes and says:

That he is the vice-president of the defendant above named, The Calhoun Gold Mining Company; that he has read the foregoing answer and knows the contents thereof, and that the facts stated in said answer are true to the best knowledge and belief of the affiant.

A. H. WEBER.

Subscribed and sworn to before me this 26th day of June, A. D. 1897.

My commission expires Dec. 26, 1897.

NELLIE PRESTON,
[SEAL.] *Notary Public.*

Endorsed: No. 4870. In the district court. The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company. Answer. Filed in the district court of El Paso county, Colorado, Jun- 28, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy. W. E. So Relle, attorney for defendant, 509–512 Cooper bldg., Denver, Colorado.

And thereafter and on, to wit, the 10th day of August, A. D. 1897, there was filed in the office of the clerk of said court the replication, which is in words and figures as follows, to wit:

58 STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court.

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} No. 4870. Replication.

I.

Now comes the plaintiff above named, and replying only to all that part or portion of the first pretended defense pleaded in defendant's answer heretofore filed herein, embraced in paragraphs "first" and "second" and "fourth" to "tenth," inclusive thereof—

Denies each and every allegation contained and set forth in said paragraphs numbered "first," "second," and "fourth" to "tenth," inclusive, of said first pretended defense, save and except such allegations as shall be hereinafter expressly admitted or expressly denied.

Admits that one A. H. Weber was on the 19th day of August, 1895, a citizen of the United States, and that on or about the 20th day of August, 1895, he filed with the clerk and recorder of said El Paso county an instrument denominated a location certificate, containing the name Ithica Tunnel site and the description in said defense stated, and that the same was recorded in Book 214, at page 324, of said records.

Admits that the Ithica tunnel, in said defense mentioned, is the excavation in plaintiff's complaint described.

59 Admits that the line of said tunnel runs diagonally across the said claims belonging to plaintiff for a distance of about 900 feet.

Admits that the said tunnel has reached a depth of about 1,365 feet from its face, but no more.

Admits that said tunnel enters the south side line of the Monarch

claim of plaintiff and has been driven entirely through said Monarch claim and into said Mammoth Pearl and Apex claims.

Admits the defendant in running said tunnel cut ten veins or lodes, bearing gold and other valuable minerals in rock in place, but denies that said veins are blind veins and do not appear upon the suface, and denies that they were not known to exist previous to the location of said tunnel site or claim.

Admits that certain instruments purporting to be duplicate copies of discovery notices or location certificates or amended location certificates referring to the lodes or veins so cut in defendant's tunnel were filed for record and recorded with the clerk and recorder of said El Paso county, but denies that the same were so filed within ninety days from the dates when defendant cut said veins in said tunnel respectively, and denies that one hundred ($100) dollars' worth of work or labor was done on or for the development of each of said veins or lodes during the year 1896, and denies that each or any of said veins was excepted out of plaintiff's patents.

60 Admits that defendant extracted and removed four hundred ($400) dollars' worth of ore from one of the veins cut in said tunnel, as in said defense averred, but denies that said four hundred ($400) dollars covers the value of all the ore mined and extracted by defendant from plaintiff's ground by means of said tunnel.

Denies that plaintiff at all times knew that said tunnel was being constructed, and alleges the fact to be that plaintiff did not know the progress thereof and had no notice or knowledge whatever that defendant had by means of said tunnel entered upon plaintiff's said premises and was extending the same therein until on or about the month of November, 1896, and that thereafter and on or about the 21st day of November, 1896, plaintiff caused a notice to be served upon defendant forbidding defendant to proceed further into plaintiff's premises with its said excavation and tunnel and commanding it to desist from removing any ores therefrom, and that thereafter and on or about the 21st day of January, 1897, plaintiff, being informed and believing that defendant had failed to obey said notice, caused to be served upon defendant a second notice of similar tenor and effect.

II.

Second. For a further and separate replication to said paragraphs "first," "second," "fourth" to "tenth," inclusive, of said first pretended defense in defendant's answer pleaded, plaintiff says:

That the patent from the United States conveying to the grantors of plaintiff title in fee-simple to said Apex vein and mining claim was issued long prior to the pretended location of said Ithica

61 Tunnel site and long prior to the commencement of the said Ithica tunnel, and on or about, to wit, April 22nd, 1895; that the United States patent conveying to the grantors of plaintiff title in fee-simple to the said Monarch and Mammoth Pearl veins and mining claims was issued in pursuance of and based upon an entry for patent made by said grantors of plaintiff and a receiver's

receipt delivered to said grantors of plaintiff long prior to the pretended location of the said Ithica Tunnel site, and long prior to the commencement of said Ithica tunnel, and on or about, to wit, the 6th day of March, 1895, and that all of the United States patents issued to plaintiff or its grantors covering and conveying to it or them said mining claims were based upon mining locations and upon applications for patent made long prior to the date of the pretended location of the said Ithica Tunnel site, and long prior to the commencement of the said Ithica tunnel, which locations were completed by the filing of location certificates on or about the following dates, to wit, Mammoth Pearl, September 25th, A. D. 1891; Monarch, September 25th, A. D. 1891; Apex, December 29th, A. D. 1891, and Champion, September 27th, A. D. 1892.

That the patents issued by the United States to plaintiff or its grantors for said Mammoth Pearl, Monarch, Apex, and Champion lodes and mining claims not only expressly convey to plaintiff or its grantors title in fee-simple to the territory within said claims as located and patented, together with all veins, lodes, or ledges of mineral-bearing rock in place upon which the same were located, but also in express terms convey to plaintiff or its grantors title in fee-simple to all other veins, lodes, and ledges throughout their entire depth, having their tops or apexes within the surface
62 boundaries of said mining claims extended downward vertically.

III.

Plaintiff, replying to defendant's pretended second and separate answer heretofore filed here—

Denies each and every allegation in said second pretended defense and separate answer contained, save and except such allegations as shall be hereinafter expressly admitted or expressly denied.

Admits that one A. H. Weber was, on the 19th day of August, 1895, a citizen of the United States, and that on or about the 20th day of August, 1895, he filed with the clerk and recorder of El Paso county aforesaid an instrument denominated a location certificate, containing the name of Ithica Tunnel site and the description in said defense stated, and that the same was recorded in Book 214, at page 324, of said county records.

Admits that said Ithica tunnel is the excavtion in said plaintiff's complaint described.

Admits that the said tunnel has reached a depth of about 1,365 feet from its face, but no more.

Admits that defendant extracted and removed four hundred ($400) dollars' worth of ore from one of the veins cut in said tunnel, as in said defense averred, but denies that said four hundred ($400) dollars covers the value of all the ore mined and extracted by defendant from plaintiff's ground by means of said tunnel.

Denies that the discovery vein of the said alleged Victor Consolidated claim of defendant, if any such vein it has, is con-
63 tinuous and crosses both end lines of said claim, or that it extends entirely across the claims of plaintiff, or that it is a

cross-vein; denies that defendant is by virtue of such alleged Victor Consolidated claim or location or otherwise entitled to the use or possession of any territory or of any vein or veins of mineral within the exterior boundaries of plaintiff's said claims, or has any interest of any kind or nature whatsoever in such territory or veins.

Denies that defendant has been damaged by the temporary restraining order heretofore issued in this cause in the sum of ten thousand ($10,000) dollars or in any other sum or at all.

Denies that plaintiff at all times knew of or watched the construction of said tunnel and remained silent when it should have spoken, and alleges the fact to be that plaintiff had no notice or knowledge whatever that defendant had, by means of said tunnel, entered upon plaintiff's said premises, and was extending the same therein, until on or about the month of November, 1896, and that thereafter and on or about the 21st day of November, 1896, plaintiff caused a notice to be served upon defendant, forbidding defendant to proceed further into plaintiff's premises with its said excavation or tunnel, and commanding it to desist from removing any ores therefrom, and that thereafter and on or about the 21st day of January, 1897, plaintiff, being informed and believing that defendant had failed to obey said notice, caused to be served upon defendant a second notice of similar tenor and effect.

IV.

For a second and further replication to defendant's pretended second and separate answer filed herein, plaintiff says:

64 That the patent from the United States conveying to the grantors of plaintiff title in fee-simple to said Apex vein and mining claim was issued long prior to the pretended location of the said Ithica Tunnel site and long prior to the commencement of said Ithica tunnel, and on or about, to wit, April 22nd, 1895; that the United States patent conveying to the grantors of plaintiff title in fee-simple to the Monarch and Mammoth Pearl veins and mining claims was issued in pursuance of and based upon an entry for patent made by the grantors of plaintiff, and a receiver's receipt delivered to the grantors of plaintiff long prior to the pretended location of the said Ithica Tunnel site and long prior to the commencement of the said Ithica tunnel, and on or about, to wit, the 6th day of March, 1895, and that all of the United States patents issued to plaintiff and its grantors and covering the conveying to it and them said mining claims were based upon mining locations and upon applications for patents made long prior to the date of the pretended location of the said Ithica Tunnel site and long prior to the commencement of the said Ithica tunnel, which locations were completed by the filing of location certificates on or about the following dates, to wit: Mammoth Pearl, September 25th, A. D. 1891; Monarch, September 25th, A. D. 1891; Apex, December 29th, A. D. 1891, and Champion, September 27th, A. D. 1892.

That the United States patents conveying to the grantors of plaintiff the said mining claims, to wit, the Mammoth Pearl, Monarch,

and Apex, were and each of them was based upon mining
65 locations and upon applications for patents made long prior to the date of the pretended location of the said Victor Consolidated claim in said second and separate defense mentioned, which locations of plaintiff's claims were completed by the filing of location certificates, as aforesaid, on or about the following dates, to wit: the Mammoth Pearl, September 25th, 1891; the Monarch, September 25th, 1891, and the Apex, December 29th, 1891.

That said United States patents, to wit, the Monarch and Mammoth Pearl patent, United States survey No. 7913, and the Apex patent, United States survey No. 8178, expressly convey to the grantors of plaintiff not only title in fee-simple to all of the territory in conflict between said mining claims and the said alleged Victor Consolidated claim, together with the veins then discovered and upon which said claims of plaintiffs were located, but also in express terms convey to grantors of plaintiff title in fee-simple to all other veins, lodes, and ledges of mineral-bearing rock throughout their entire depth, having their tops or apices within the surface boundaries of said claims extended downward vertically, with a right to the perpetual and exclusive use and enjoyment thereof, and that the United States patent issued to defendant or its grantors for the said alleged Victor Consolidated mining claim expressly excludes and excepts from the grant therein made all of said conflicting territory and also all of said veins, lodes, and ledges, without exception, throughout their entire depth, having their tops or apices therein.

That the vein or veins cut by defendant's said Ithica tunnel at a depth of 927 and 961 feet respectively from the mouth of said
66 tunnel are not cross-veins or, if but one, is not a cross-vein as to the said Apex mining claim, but the same appears by plaintiff's explorations, so far as made and according to its best information, to be but one vein and to extend lengthwise and apex within the exterior boundary lines of said Apex claim.

V.

For a third and further replication to defendant's said pretended second and separate answer or defense in its said answer pleaded, plaintiff says:

That under and in pursuance of law and the rules and regulations of the United States land office, which govern and regulate the patenting of public lands of the United States, the applicant for patent is required to file an instrument denominated "Application to purchase," in which instrument he must, among other things, particularly describe the territory he desires to enter and patent; that in pursuance of such rules and regulations defendant or its grantor filed its application to purchase or enter the said Victor Consolidated claim in its answer mentioned, and embodied in such application a description of the premises it sought to include therein; that in and by said application to purchase all the territory covered by the original pretended location of the said Victor Consolidated claim of defendant, and also within the boundary lines of the said Mammoth

Pearl, Monarch, and Apex mining claims, belonging to plaintiff, was expressly excluded and excepted from the grant sought by defendant or its grantor, and any and all right to or interest in any of said conflicting territory was then and thereby voluntarily and
67 affirmatively relinquished by defendant or its grantor, and that in and by said application to purchase or enter defendant or its grantor also expressly and voluntarily excluded and excepted from the grant sought all veins, lodes, or ledges of mineral-bearing rock having their tops or apices within said excluded, excepted, and relinquished conflicting ground throughout their entire depth, and resigned and renounced any and all right to or interest in said veins, lodes, or ledges; that the receipt afterwards issued by the receiver of the United States land office to defendant or its grantor for the said Victor Consolidated claim, in pursuance of said application to purchase or enter, likewise expressly excepted and excluded from said Victor Consolidated entry for patent all of said conflicting ground or territory and all of the said veins, lodes, or ledges having their tops or apices therein.

That the patent issued by the United States to defendant or its grantor under and in pursuance of said application to purchase or enter said Victor Consolidated claim, and under and in pursuance of the receiver's receipt so issued therefor, also affirmatively and expressly reserved, excepted, and excluded from the grant thereby made all of said conflicting territory and all of said veins, lodes, or ledges aforesaid, throughout their entire depth, having their tops or apices therein.

That the United States patents issued to the grantors of plaintiff for the said Mammoth Pearl and Monarch mining claims, survey No. 7913, and for the said Apex mining claim, survey No. 8178, include and cover all of said conflicting ground and all of said veins, lodes, and ledges, without exception, having their tops or apices
68 therein, throughout their entire depth, and convey the same to the grantors of plaintiff by free, clear, and unincumbered title, in fee-simple, together with the corresponding right to the exclusive use and enjoyment thereof, all of which title, rights, and uses have been heretofore duly conveyed to plaintiff.

By reason of which facts, matters, and things last above stated plaintiff respectfully pleads that defendant is now estopped and forever barred from setting up, as against this plaintiff and its grantees, any claim of right to or interest in such conflicting territory or said lodes, veins, and ledges having their tops or apices therein, under and by virtue of its alleged location and patent of the said Victor Consolidated Lode mining claim.

And plaintiff further alleges that in view of the other matters and things in this replication set forth defendant has, by virtue of its alledged tunnel-site location and its said tunnel, or its said Victor Consolidated location and patent, or otherwise, no legal or equitable right of any kind whatever to or interest in any of the territory covered by plaintiff's said patents to the said Mammoth Pearl, Monarch, Apex, and Champion claims, or in or to any or either of the ten veins cut by its said tunnel, or in or to any other veins, lodes,

or ledges having their tops or apices within the last-named mining claims, and that in running said tunnel upon plaintiff's ground and in the removal of ore therefrom defendant became and was trespasser, and the matters and things in said answer of defendant averred are in all respects wholly insufficient to constitute a legal and equitable excuse or defense.

69 Wherefore plaintiff repeats its prayer for the specific relief asked for in the complaint, and for such other and further relief as to the court may seem meet and proper.

J. C. HELM,
COLBURN & DUDLEY,
Att'ys for Plaintiff.

STATE OF COLORADO, }
County of El Paso, } *ss:*

Chas. H. Dudley, being first duly sworn, on oath deposes and states that he is the secretary of the plaintiff above named, The Ajax Gold Mining Company; that he has read the foregoing replication and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information, and belief.

CHAS. H. DUDLEY.

Subscribed and sworn to before me this — day of August, A. D. 1897.

——.

Endorsed: No. 4870. In the district court, El Paso county, Colo. The Ajax Gold Mining Company, plaintiff, *vs.* The Calhoun Gold Mining Company, defendant. Replication. Filed in the district court of El Paso county, Colorado, Aug. 10, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy. Colburn & Dudley, Colorado Springs, Colo., attorneys for —.

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colo-
70 rado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the courthouse, in the city of Colorado Springs, in the county and State aforesaid, on the 7th day of September (it being the first Tuesday in September), A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry McAllister, Jr., district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 13th day of September, A. D. 1897, the same being one of the days of the regular September, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, its attorney, also comes, and thereupon, by consent, it is ordered by the court that said defendant may have leave to amend its answer
71 herein by interlineation, and that said plaintiff have leave to amend its replication herein by interlineation.

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the motion of said plaintiff to strike out the third paragraph of the first defense of the answer of said defendant, is argued by counsel and submitted to the court and is by the court granted; and thereupon, by consent—

It is ordered by the court that the amendment filed herein today stand as the amendment to the answer herein.

And thereupon and — the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

72 At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the motion of said defendant to dissolve the injunction heretofore issued herein, is argued by counsel and submitted to the court and is by the court denied.

And thereupon and on, to wit, the same day, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon, by consent—

It is ordered that upon the giving by said defendant of a good and sufficient bond, condition in the penal sum of $2,500.00 and with surety or sureties to be approved by the clerk of this court, a temporary writ of injunction may issue restraining the said plaintiff from working the vein known as vein No. 9 in the Ithica tunnel, in the Cripple Creek mining district, El Paso county, Colorado.

73 And it is further ordered by the court that the bond heretofore required of said plaintiff be increased to the sum of $2,500.00, with sureties to be approved by the clerk of this court.

And thereupon and on, to wit, the same day, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Injunction, etc.

And thereafter and on, to wit, the 11th day of October, A. D. 1897, there was filed in the office of the clerk of said court the motion, which is in words and figures as follows, to wit:

STATE OF COLORADO, }
County of El Paso, } *ss:*

In the District Court.

THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Motion.

Comes now the defendant above named and moves this honorable court for an order permitting the defendant, its agents and employees, to enter upon the premises described in plaintiff's complaint at any and all times prior to the trial of said cause for the following purposes, to wit:

74 First. To clean out, examine, inspect, and survey any or all shafts, tunnels, and other excavations upon said premises.

Second. To make any and all excavations which defendant may

desire upon or from the surface of said premises for the purpose of exploring and exposing the veins or lodes claimed by defendant therein; to make any and all excavations necessary to expose from the surface upon and across the premises described in said complaint the vein or veins of the Victor Consolidated claim, U. S. patent survey No. 8747.

Third. To enter into the Ithica tunnel, described in defendant's answer, and from said tunnel or the workings heretofore connected therewith to explore any and all veins or lodes intersected in said tunnel by means of raises, drifts, or cross-cuts; to cause a raise to be made from said tunnel to the surface upon the vein denominated in said answer Ithica Tunnel No. 9 lode; to cause drifts to be run upon said last-mentioned vein entirely across the premises described in plaintiff's complaint.

Fourth. Defendant further moves this honorable court for an order and instructions relative to the disposition of the ores which may be discovered or extracted in the construction of said drifts and raises.

W. E. SO RELLE,
Attorney for Defendant.

Endorsed: In the district court. No. 4870. The Ajax Gold Mining Co., plaintiff, *vs.* The Calhoun Gold Mining Co., de-
75 fendant. Motion and notice to expose veins. Filed in the district court of El Paso county, Colorado, Oct. 11, 1897. Edgar Howbert, clerk, by E. C. Davis, deputy.

And thereafter and on, to wit, the 16th day of November, A. D. 1897, the same being one of the days of the regular September, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the defendant's motion for leave to do certain development-work on the property in controversy herein, is argued by counsel and submitted to the court, and the court, not being sufficiently advised in the premises, doth take the same under advisement.

76 At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon, by consent—

It is ordered by the court that this case be set for trial on the 20th day of January, A. D. 1898.

And thereafter and on, to wit, the 18th day of October, A. D. 1897, the same being one of the days of the regular September, A. D.

1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by Colburn and Dudley, its attorneys, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon defendant's motion to be allowed to prove the cross-vein herein, is argued by counsel and submitted to the court, and the court, not being sufficiently advised in the premises, doth take the same under advisement.

77 And thereafter and on, to wit, the 16th day of November, A. D. 1897, the same being one of the days of the regular September, A. D. 1897, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by J. C. Helm, Esq., its attorney, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes; and thereupon this cause, coming on for hearing before the court upon the defendant's motion for leave to do certain development-work on the property in controversy herein, is argued by counsel and submitted to the court, and the court, not being sufficiently advised in the premises, doth take the same under advisement.

Pleas before Honorable Ira Harris, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division 2 thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of January (it being the second Monday in January), A. D. 1898, and of the Independence of the United States the one hundred and twenty-second.

78 Present: Hon. Ira Harris, judge aforesaid; Henry McAllister, Jr., district attorney; Edgar Howbert, clerk of said court; W. S. Boynton, sheriff of said county.
Attest: EDGAR HOWBERT, *Clerk*.

Be it remembered that heretofore and on, to wit, the 17th day of January, A. D. 1898, the same being one of the days of the regular January, A. D. 1898, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant.

At this day in open court comes the said plaintiff, by its attorneys, Colburn & Dudley, Esqrs., and the defendant, by its attorney, W. E. So Relle, also comes.

And thereupon, by consent, it is ordered by the court that the order heretofore entered whereby this cause was set for trial be, and the same hereby is, vacated.

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county in said State, in
79 division one thereof, at a term begun and held at the courthouse, in the city of Colorado Springs, in the county and State aforesaid, on the 10th day of January (it being the second Monday in January), A. D. 1898, and of the Independence of the United States the one hundred and twenty-second.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry McAllister, Jr., district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 2nd day of February, A. D. 1898, the same being one of the days of the regular, A. D. 1898, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Order.

Upon hearing the application of plaintiff for dissolution of the injunction against it as to what is known as the No. 9 vein, plaintiff appearing by Messrs. Colburn and Dudley, its attorneys, and the defendant appearing by W. E. So Relle, Esq., its attorney—

80 It is ordered that the injunction against plaintiff in favor of defendant in connection with this cause be, and the same is hereby, dissolved.

Done in open court this 2nd day of February, A. D. 1898.

HORACE G. LUNT, *Judge.*

Pleas before Honorable Horace G. Lunt, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for El Paso county, in said State, in division two thereof, at a term begun and held at the court-house, in the city of Colorado Springs, in the county and State aforesaid, on the 9th day of May, A. D. 1898 (it being the second Monday in May), and of the Independence of the United States the one hundred and twenty-second.

Present: Hon. Horace G. Lunt, judge aforesaid; Henry McAllister, Jr., district attorney; W. S. Boynton, sheriff of said county; Edgar Howbert, clerk of said court.

Attest: EDGAR HOWBERT, *Clerk.*

Be it remembered that heretofore and on, to wit, the 16th day of May, A. D. 1898, the same being one of the days of the regular May, A. D. 1898, term of said court, the following proceedings, *inter alia*, were had and done, to wit:

81 THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction.

At this day in open court comes the said plaintiff, by Colburn & Dudley, Esqs., its attorneys, and the said defendant, by W. E. So Relle, Esq., its attorney, also comes. Thereupon, by agreement of the parties hereto and on motion of plaintiff, it is ordered by the court that the agreed statement of the facts in this cause heretofore filed herein by the said parties may be, and the same is hereby, withdrawn, and leave to file herein instanter a new agreed statement of such facts is hereby allowed; which is accordingly done.

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

82 At this day in open court comes the said plaintiff, by Colburn and Dudley, Esqrs, its attorneys, and the said defendant, by W. E. So Relle, Esqr., its attorney, also comes. Thereupon this cause coming on regularly for trial before the court upon the agreed statement of facts filed herein by the said parties, the questions at issue herein are argued by counsel and submitted to the court, and the court, being now sufficiently advised in the premises, doth find the issues herein joined in favor of said plaintiff and against said defendant, and that said plaintiff is entitled to the possession and occupancy of the property in controversy herein; that there is due and owing from said defendant to the said plaintiff the sum of four hundred ($400.00) dollars, and—

It is further ordered that the temporary injunction heretofore granted herein on the 27th day of March, A. D. 1897, be, and the same is hereby, made permanent and perpetual, and it is further

ordered that judgment in accordance with said finding and for costs be entered herein in favor of said plaintiff and against said defendant, and that the same be recorded in the judgment book.

To which findings and ruling of the court said defendant duly excepts.

Which said judgment is in words and figures as follows, to wit:

83 THE AJAX GOLD MINING COMPANY, a Corporation, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Defendant.
} Judgment.

Now, on this the 16th day of May, A. D. 1898, this cause, by agreement of parties, coming on to be heard before the court, without a jury, upon the pleadings and upon the stipulation of parties duly filed and upon the exhibits offered in evidence, Messrs. Colburn & Padley and J. C. Helm, Esq., appearing for plaintiff, and W. E. So Relle, Esq., appearing for defendant, and the court, having heard the arguments of counsel and having duly considered said stipulation and the said pleadings and exhibits and now being fully advised in the premises, doth find—

That the matters and things stated in the complaint are true, and that the plaintiff is and at the commencement of this suit was the owner in fee of the said Apex, Mammoth Pearl, and Monarch Lode mining claims in the complaint described, and was entitled to the sole and exclusive, peaceable, and undisturbed possession of each and every part thereof, including all veins, lodes, or ledges having their tops or apices therein, but that defendant, without plaintiff's knowledge or consent, entered into and upon a portion of plaintiff's said premises, below the surface thereof, and extended its excavation, the said Ithica tunnel in the pleadings mentioned, about 900 feet therein; that in said tunnel defendant cut several veins
84 of mineral-bearing rock in place and took out and removed therefrom and converted to its own use a large quantity of ore belonging to plaintiff, the same being of the value of $400.00; that defendant was at the commencement of this action further extending said excavation or tunnel into plaintiff's said premises and taking out and removing additional ore therefrom, and was threatening to continue said wrongful acts.

And the court further finds that at and prior to the commencement of this action defendant was the owner in fee of the Victor Consolidated Lode mining claim in the answer described, and that the apex of the vein thereof exposed in the discovery shaft is continuous throughout the length of said claim, and is a cross-vein on the strike to plaintiff's Monarch and Mammoth Pearl and the veins thereof and to the vein of the Apex claim; that the vein of the said Victor Consolidated claim was not known to exist prior to its discovery in said discovery shaft by defendant and its grantors; that prior to the commencement of this action and on, to wit, the 19th day of August, A. D. 1895, the defendant located a tunnel site called

the Ithica Tunnel site, under section 2323 of the Revised Statutes of the United States, and thereafter prosecuted work in said tunnel with great diligence until enjoined by order of this court, and that said tunnel has reached a depth of 1,365 feet from the face thereof; that the face of said tunnel at the date of its location was upon unappropriated public domain, and the line thereof crosses plaintiff's claims, and also the territory originally in conflict between them and defendant's Victor Consoli-
85 dated claim; that the veins cut by said tunnel within the side lines of plaintiff's claims do not appear on the surface and were not known to exist prior to the location of said tunnel site; that the location of said Ithica Tunnel site was long subsequent to the location of each and every of plaintiff's said lode claims, and was also subsequent to the issue of patents by the United States Government for plaintiff's said Apex Lode mining claim, and also subsequent to the issuance of and delivery of the receiver's receipt and final entry in the United States Land Office of plaintiff's said Monarch and Mammoth Pearl Lode mining claims, but said tunnel was located prior to the issuance of patents for said Monarch and Mammoth Pearl claims; that the location of defendant's Victor Consolidated claim was subsequent to the location of each and every of plaintiff's said lode mining claims, and was also subsequent to the application for patent in the United States Land Office therefor and while said patent proceedings were pending.

And the court further finds that in the application to the United States Land Office for patent to defendant's said Victor Consolidated lode claim, and also in the application of said Land Office to purchase the same, likewise in the receiver's receipt issued upon the final entry thereof, and from the grant contained in the United States patent issued thereto, all of the surface contained in each and every of plaintiff's said lode claims conflicting with the said Victor Consolidated lode claim, together with all veins, lodes, or ledges having their tops or apexes in said conflicting surface, was expressly excluded and excepted, and that all of said surface so in con-
86 flict between plaintiff's said mining claims and the said Victor Consolidated lode claim of defendant, together with all of said veins, lodes, or ledges having their tops or apexes therein, was included in the grant and conveyed by the United States patents issued for plaintiff's said lode claims.

Wherefore it is hereby ordered, adjudged, and decreed that plaintiff is the owner in fee and is entitled to the exclusive, peaceable, and undisturbed possession of said premises, to wit, the said Apex Lode mining claim, patent survey No. 8178, and the said Monarch and Mammoth Pearl Lode mining claims, patent survey No. 7913, the same being in the Cripple Creek mining district, county of El Paso and State of Colorado, together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims extended downward vertically, and that plaintiff do have and recover of and from defendant its damages for the said wrongful entry thereon and for the said injuries thereto in

the sum of $400.00, together with its costs of suit herein laid out and expended, and that execution issue therefor.

And it is further ordered, adjudged, and decreed that the temporary injunction heretofore issued herein, enjoining and restraining defendant, its officers, agents, and employees, from further prosecuting or extending said tunnel and from entering upon or within or underneath plaintiff's claims and from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within the side
87 and end lines of plaintiff's said claims extended downward vertically, be, and the same is hereby, made perpetual, and that defendant, its officers and employees, be, and they are hereby, forever enjoined from the renewal of each or any of said wrongful acts.

By the court:

HORACE G. LUNT, *Judge.*

And thereupon and on the same day the following proceedings, *inter alia*, were had and done, to wit:

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Injunction, etc.

At this day, in open court, comes the same defendant, by W. E. So Relle, Esq., its attorney, and prays an appeal to the supreme court of the State of Colorado, which is allowed upon condition that it file herein within thirty days from this day its appeal bond, conditioned in the sum of five hundred ($500) dollars, with sureties, to be approved by the clerk of this court.

And time and until sixty days from this day is hereby allowed to said defendant within which to prepare and tender to Honorable Horace G. Lunt, one of the judges of this court, its bill of exceptions by it reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this day.

88 And thereafter and on to wit, the 14th day of June, A. D. 1898, there was filed in the office of the clerk of said court the following appeal bond, which is in words and figures, to wit:

Know all men by these presents that we, the Calhoun Gold Mining Company, as principal, and the Fidelity and Deposit Co. of Md., a corporation doing business under the laws of the State of Colorado, are held and firmly bound unto the Ajax Gold Mining Company in the penal sum of five hundred dollars; for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Denver, Colorado, this 14th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

The condition of the above obligation is such that whereas the said The Ajax Gold Mining Company did on the 16th day of May, one thousand eight hundred and ninety-eight, at a term of the district court then being holden within and for the county of El Paso

and State of Colorado, obtain a judgment against the above-bounden The Calhoun Gold Mining Co. for the sum of four hundred dollars and — cents and cost of suit, from which judgment the said The Calhoun Gold Mining Company has prayed for and obtained an appeal to the supreme court of said State of Colorado:

Now, if the said The Calhoun Gold Mining Co. shall duly prosecute said appeal and shall, moreover, pay the amount of the
89 said judgment, costs, interests, and damages rendered and to be rendered against The Calhoun Gold Mining Co., the said defendant, in case the said judgment shall be affirmed in the said supreme court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER,
Vice-President. [SEAL.]

Attest: JAMES QUINN, JR., *Secretary.*

THE FIDELITY AND DEPOSIT CO. OF MD.,
By GUY LE R. STEVICK, [SEAL.]
Member of Local Board.

Attest:
[SEAL.]
FRANCIS A. CHAPMAN,
For Chapman & Maitland, General Agents. [SEAL.]

STATE OF COLORADO, } *ss:*
County of Arapahoe, }

Guy Le R. Stevick, a member of the local board of directors of the Fidelity and Deposit Company of Maryland, the surety in the foregoing bond, and Francis A. Chapman, a member of the firm of Chapman & Maitland, the duly authorized agents of the said The Fidelity & Deposit Company of Maryland, being duly sworn, depose and say that the said surety company is a corporation of the State of Maryland carrying on the business of a surety company in the State of Colorado; that said surety company has fully complied with all of the laws of the State of Colorado relating to surety companies doing business in this State, and particularly has complied with the requirements and provisions of the act concerning surety
90 companies approved March 31st, 1897; that affiants are respectively the officers and agents of the said company, as hereinbefore stated, and that as such officers and agents they are duly authorized to execute the bond hereto annexed on behalf of the said company; that said surety company is authorized by its articles of incorporation and by its laws to execute the bond hereto annexed, and that such company has assets consisting of capital stock paid up in cash and surplus, over and above all of its liabilities, exceeding the sum of $2,000,000 *dollars.*

GUY LE R. STEVICK.
FRANCIS A. CHAPMAN.

Subscribed and sworn to before me this 14th day of June, A. D. 1898. My commission will expire Feb'y 18, 1901.

MAUDE L. SELVY,
[SEAL.] *Notary Public.*

Endorsed: No. 4870. Appeal bond. The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company. Approved and filed in the district court of El Paso county, Colorado, Jun- 14, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado within and for El Paso county, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the complaint, injunction writ, petition for
91 removal, answer, replication, appeal bond, and all orders had and entered of record in a certain cause lately pending in said court on the civil side thereof, wherein The Ajax Gold Mining Company was plaintiff and The Calhoun Gold Mining Company was defendant, as the same appear on file and of record in this office remaining.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Colorado Springs, this 12th day of Sept., A. D. 1898.

EDGAR HOWBERT, *Clerk*,
[SEAL.] By M. L. TAYLOR, *Deputy*.

Revenue stamp.

92 STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of the Fourth Judicial District of the State of Colorado, Sitting within and for said County of El Paso.

THE AJAX GOLD MINING COMPANY, Plaintiff,
vs.
THE CALHOUN GOLD MINING COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that on the sixteenth day of May, A. D. 1898, at the hour of ten o'clock a. m. of said day, before the Honorable Horace G. Lunt, judge of said court, upon the trial and hearing of said cause under and by virtue of the stipulations and agreed statement of facts hereto annexed, the following proceedings were had, to wit:

Appearances.

Messrs. Colburn and Dudley and J. C. Helm, Esq., appearing as counsel for the plaintiff, and W. E. So Relle, Esq., appearing as counsel for the defendant.

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93 STATE OF COLORADO, } ss:
County of El Paso, }

In the District Court of the Fourth Judicial District, Sitting within and for said County of El Paso.

THE AJAX GOLD MINING COMPANY, Plaintiff, }
vs. } Stipulation.
THE CALHOUN GOLD MINING COMPANY, Defendant. }

Whereas the following pleadings have been filed in this cause, to wit, complaint, answer, and replication; and

Whereas it is evident from said pleadings that certain questions of law are involved in the cause, a determination of which may be decisive, said questions of law being as follows, to wit:

First. Whether or not the Ithica tunnel in said pleadings described is entitled to a right of way through plaintiff's lode claims.

Second. Whether or not defendant has acquired by virtue of said tunnel and tunnel-site location the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

Third. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries and across plaintiff's lode claims.

94 Fourth. Whether or not defendant may, in this cause, introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff prior to the location of said tunnel site; but,

Whereas, in order to properly present said questions of law at this time it is necessary that certain matters of fact, which appear as controverted by the pleadings, be treated as established, and that the hearing thereon be regarded as a trial of the cause:

Now, therefore, it is stipulated that the court may try the cause and determine the aforesaid legal propositions, considering in conjunction with the pleadings the following agreed statement of facts, viz:

1. That the record titles of the Apex, Monarch, and Mammoth Pearl claims are vested in plaintiff, and that the record titles of the Victor Consolidated claim and the Ithica tunnel site and veins discovered therein are vested in defendant.

2. That the map or plat heretofore filed by defendant, showing plaintiff's lode claims and the defendant's said Ithica tunnel and the veins discovered therein and the Victor Consolidated lode claim, is in evidence, marked Exhibit "A," and is correct; that the Champion Lode claim of plaintiff need not be adjudicated in the present trial of this cause.

3. That on the issue made by the answer and replication, as to whether mineral in place was discovered on plaintiff's said Monarch and Mammoth Pearl Lode claims or in the discovery shafts

thereof prior to the date of the location of the said Ithica
95 tunnel site, defendant offered testimony tending to negative such a discovery, but which testimony was, on plaintiff's objection, ruled out by the court, such ruling being duly excepted to by defendant.

4. That the Ithica tunnel cuts certain blind lodes in the pleadings mentioned, crossing the lines thereof within plaintiff's said territory—that is, lodes that do not appear on the surface and not known to exist prior to the date of the location of the said tunnel site; that said veins were intersected in said tunnel at the following distances from the face thereof, to wit:

Vein No. 1 at 138 feet.
Vein No. 2 at 165 feet.
Vein No. 3 at 356 feet.
Vein No. 4 at 425 feet.
Vein No. 5 at 581 feet.
Vein No. 6 at 643 feet.
Vein No. 7 at 681 feet.
Vein No. 8 at 926 feet.
Vein No. 9 at 961 feet.

The respective dates of the discovery of said veins are as shown in the answer.

5. That the said Ithica tunnel-site location is in form in compliance with law, and the location of each of said tunnel veins was made as described in defendant's answer and in the manner recognized by the case of Ellet *v.* Campbell, 167 U. S. Rep., —; that the mouth or face of said tunnel was at the date of its location on public domain, and that the defendant has prosecuted work diligently and continuously upon said tunnel from the date of its location until enjoined by this court.

6. That the apex of defendant's Victor Consolidated vein passes through the discovery shaft and the northerly end line, in-
96 cluding a portion of the northerly end territory of the Victor Consolidated claim, and that said vein is continuous throughout the length of said claim; that the apex of said vein also passes through the south end line of plaintiff's said Apex claim and extends northerly within the boundaries of said Apex claim 550 feet from the said south end line and crosses the westerly side line of said claim; that said vein, after passing out of said Apex claim, also passes entirely through and crosses plaintiff's said Monarch and Mammoth Pearl claims and the veins thereof; that said Victor Consolidated vein was not known to exist prior to defendant's discovery in said discovery shaft and location thereof as the Victor Consolidated vein.

7. That the location certificates of plaintiff's said claims, purporting to complete the locations thereof, were filed in the office of the county clerk of El Paso county, Colorado, on the following dates, to wit, Mammoth Pearl, September 25th, A. D. 1891; Monarch, September 25th, 1891; Apex, December 29, A. D. 1891; that the applications for patent for plaintiff's said claims were filed in the U. S. land office at Pueblo, Colorado, on the following dates, to wit, Monarch and

Mammoth Pearl, May 9, 1893; Apex, March 31, 1893; that receiver's receipts were issued by the officers of said land office to the plaintiff upon its said locations on the following dates, to wit, Monarch and Mammoth Pearl on the 6th day of March, A. D. 1895, and the Apex on the 16th day of January, A. D. 1895; that United States patents were issued to plaintiff upon its said claims at the following dates, to wit, Monarch and Mammoth Pearl, September 6th, A. D. 1895, and the Apex, April 22, A. D. 1895.

8. That defendant's said Ithica tunnel site was located on the 19th day of August, A. D. 1895; that the location certificate
97 of the said Victor Consolidated Lode claim, purporting to complete the location thereof, was filed in the office of the county clerk of said county on the 2nd day of November, A. D. 1893; that the application for patent upon said claim was filed in said U. S. land office on the 23rd day of April, A. D. 1894; that the receiver's receipt was issued to defendant by the officers of said land office on the 3rd day of September, A. D. 1896; that United States patent was issued to defendant upon its said lode claim on the 25th day of January, A. D. 1897.

9. That the following instruments, to wit, original patents of the said Apex, Monarch, and Mammoth Pearl claims of plaintiff and the original patent of the Victor Consolidated claim of defendant, also the certified copy of the application for patent and application to purchase, and, likewise, a certified copy of the receiver's receipt for said Victor Consolidated claim, are filed herewith, marked respectively Exhibits "B," "C," "D," "E," "F," and "G," "H," "I," "J," &c.; that said instruments are in evidence and before the court; also original or certified copies of location certificates of all of said tunnel locations and Victor Consolidated Lode claims and of said Ithica Tunnel site.

Provided that when a decision is rendered by the court determining the aforesaid questions of law, based upon the pleadings, documents, and matters of fact hereinabove stipulated, final judgment shall be entered thereon, and the losing party may take the same to the supreme court of the State and of the United States for review upon the record so made as in other cases, and in the event of such review this stipulation, together with the said map, patents, and
98 other exhibits, shall, when properly attested by the clerk, constitute the bill of exceptions, and thus be made a part of the record.

Provided, further, that in the event of a reversal or partial reversal of such judgment and a retrial of the cause each and every of the foregoing matters may be put in issue, and the hearing of such issues upon the evidence and otherwise shall in no manner be controlled or affected by this stipulation.

Dated at Colorado Springs, Colo., this 24th day of March, A. D. 1898.

COLBURN AND DUDLEY AND
J. C. HELM,
Attorneys for Plaintiff.
W. E. SO RELLE,
Attorney for Defendant.

Endorsed: No. 4870. District court, El Paso county. The Ajax Gold Mining Co., pl'ff, *vs.* The Calhoun Gold Mining Co., def't. Stipulation. Set for 1 hour's arg., April 15th, '98. Filed in the district court of El Paso county, Colorado, May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, }
County of El Paso, } *ss:*

In the District Court.

THE AJAX GOLD MINING COMPANY, Plaintiff, }
vs. } Stipulation.
THE CALHOUN GOLD MINING COMPANY, Defendant. }

99 It is hereby stipulated and agreed by and between the plaintiff and defendant that all exhibits specified in the stipulation bearing date March 24th, 1898, and filed May 16th, 1898, may be filed by the clerk as of date May 16th, 1898.

Dated at Denver, Colo., June 18th, 1898.

COLBURN AND DUDLEY AND
J. C. HELM,
Attorneys for Plaintiff.
W. E. SO RELLE,
Attorney for Defendant.

General Land Office, No., 25530; mineral certificate No. 535.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 535 of the register of the land office at Pueblo in the State of Colorado, accompanied by other evidence whereby it appears that Charles E. McRay, James E. McRay and George F. McRay did, on the sixteenth day of January, A. D. 1895, duly enter and pay for that certain mining claim or premises known as the Apex Lode mining claim, designated by the surveyor general as lot No. 8178, embracing a portion of section twenty-nine in township fifteen south of range sixty-nine west, sixth principal meridian, in the Cripple Creek mining district, in the county of El Paso,
100 and State of Colorado, in the district of lands subject to sale at Pueblo and bounded, described, and platted as follows, with magnetic variation as hereinafter stated.

Beginning at corner No. 1 a pine post five inches square marked 1–8178, with mound of stone, from which the south quarter corner of section twenty-nine in township fifteen south of range sixty-nine west, sixth principal meridian, bears south forty degrees and thirty-six minutes east two thousand two hundred and six-tenths feet distant; corner No. 3 of survey No. 7475, the Dead Pine Lode claim,

bears north one degree and twenty-one minutes east four hundred and sixty and forty-four-hundredths feet distant; a pine ten inches in diameter blazed and marked 1–8178 B. T. bears north forty-five degrees west one hundred and thirty-two and one-tenth feet distant, and an aspen four inches in diameter blazed and marked 1–8178 B. T. bears north seventy-six degrees and thirty-five minutes east forty and two-tenths feet distant.

Thence, first course, magnetic variation fourteen degrees and twenty-five minutes east, south sixty-seven degrees, forty minutes and thirty seconds west fifty-one and four-tenths feet intersect line 2–3 of said survey No. 7475 at south six degrees and fifty-six minutes west four hundred and eighty-three and four-tenths feet from corner No. 3; three hundred and forty-two and sixty-seven-hundredths feet to corner No. 2.

Thence, second course, magnetic variation fourteen degrees and twenty-five minutes east, north seven degrees and forty minutes east six hundred and fifty-four and eighty-three-hundredths feet to corner No. 3.

Thence, third course, magnetic variation thirteen degrees and forty-three minutes east, north five degrees and thirty-eight
101 minutes west seven hundred and ninety-two and fifty-seven-hundredths feet to corner No. 4.

Thence, fourth course, magnetic variation fourteen degrees east, north sixty-seven degrees, forty minutes and thirty seconds east two hundred and eighty-three and sixty-two-hundredths feet to corner No. 5, from which discovery shaft bears south fourteen degrees and twenty-four minutes west three hundred and fifty-five and two-tenths feet distant.

Thence, fifth course, magnetic variation thirteen degrees and fifty minutes east, south five degrees and thirty-eight minutes east seven hundred and ninety-two and fifty-seven-hundredths feet to corner No. 6.

Thence, sixth course, magnatic variation thirteen degrees and forty-three minutes east, south two degrees and fifty-nine minutes west one hundred and sixty-eight feet intersect line 3–4 of said survey No. 7475 at south eighty-three degrees and four minutes east thirteen and two-tenths feet from corner No. 3; six hundred and twenty-seven and four-tenths feet to corner No. 1, the place of beginning. Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claim or survey No. 7475 and also all that portion of said Apex vein or lode and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; said lot No. 8178 extending one thousand four hundred and thirty-three and sixty-eight-hundredths feet in length along said Apex vein or lode, the granted premises in said lot containing eight acres and seventy-hundredths of an acre of land, more or less.

102 Now know ye, that there is therefore hereby granted by the United States unto the said Charles E. McRay, James E. McRay, and George F. McRay, and to their heirs and assigns, the said min-

ing premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said apex vein, lode, or ledge, and of all other veins, lodes, and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 8178 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 8178, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantees above named, and to their heirs and assigns forever; subject nevertheless, to the above-mentioned and the following conditions and stipulations:

First. That the premises hereby granted with the exception of the surface, may be entered by the proprietor of any other
103 vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

By the President: GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
[SEAL.] *Recorder of the General Land Office.*

Recorded, vol. 266, pages 17 to 20, inclusive.

104 Endorsements: M. E. 535. Compared. Apex lode. 36844. Ex. B. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this instrument was filed for record in my office at 9.21 o'clock a. m., March 18, 1897, and is duly recorded in Book 196, page 97.

J. W. BATES, *Recorder.*

2.10.

STATE OF COLORADO, } ss:
County of El Paso, }

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado within and for El Paso county, do hereby certify the above and foregoing to be a true, perfect, and complete copy of United States patent—General Land Office No., 25530—issued April 22nd, 1895, to Charles E. McRay, James E. McRay, and George F. McRay, introduced as Exhibit — in case No. 4870, The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Colorado Springs, this 5th day of August, 1898.

EDGAR HOWBERT, *Clerk,*
By E. C. DAVIS, *Deputy.*

(Revenue stamp.)

105 General Land Office No., 26018; mineral certificate No. 575.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate, No. 575, of the register of the land office at Pueblo, in the State of Colorado, accompanied by other evidence whereby it appears that J. A. Fiedler and the heirs of L. B. Hammond, deceased, did, on the sixth day of March, A. D. 1895, duly enter and pay for that certain mining claim or premises, known as the Monarch and Mammoth Pearl Lode mining claims, designated by the surveyor general as lot No. 7913, embracing a portion of section twenty-nine in township fifteen south of range sixty-nine west, sixth principal meridian, in the Cripple Creek mining district, in the county of El Paso and State of Colorado, in the district of lands subject to sale at Pueblo, and bounded, described and platted as follows, with magnetic variations as hereinafter stated:

Beginning for the description of the Monarch Lode claim at corner No. 1, a porphyry stone 2.4 x 1.6 x .7 feet, chiseled 1–7913 with mound of stone, from which the south quarter corner of section twenty-nine in township fifteen south, of range sixty-nine west, sixth principal meridian, bears south twenty-two degrees and thirty minutes east two thousand six hundred and ninety-seven and seven-tenths feet distant, and corner No. 2 of survey No. 7683, the Necessity Lode claim, bears south forty-four degrees and twenty
106 minutes west five hundred and ten and ninety-one-hundredths feet distant.

Thence, first course, magnetic variation thirteen degrees and fifty minutes each, south fifty-five degrees and thirty-two minutes west thirty-nine and thirty-two-hundredths feet intersect line 4–1 of said survey No. 7683; four hundred and nineteen and ninety-one-hundredths feet intersect line 2–3 of said survey No. 7683; four hundred and forty-eight and seventy-seven-hundredths feet intersect line 6–1 of survey No. 8178, the Apex Lode claim, at south two degrees and fifty-nine minutes west fifty-nine and one-tenth feet from corner No. 6; seven hundred and eighty-six and seventy-seven-hundredths feet intersect line 2–3 of said survey No. 8178 at south seven degrees and forty minutes west one hundred and forty-five and twenty-three-hundredths feet from corner No. 3; one thousand and four hundred and ninety-eight and five-tenths feet to corner No. 2.

Thence, second course, magnetic variation twelve degrees and twenty minutes east, north thirty-four degrees and twenty-eight minutes west one hundred and fifty feet to a point from which discovery shaft bears north fifty-five degrees and thirty-two minutes east seven hundred and fifty feet distant three hundred feet to corner No. 3.

Thence third course, magnetic variation twelve degrees and fifty-five minutes east, north fifty-five degrees and thirty-two minutes east nine hundred and fourteen and eighty-two-hundredths feet intersect line 3–4 of said survey No. 8178 at north five degrees and thirty-eight minutes west two hundred and twenty and fifty-five-hundredths feet from corner No. 3; one thousand two hun-
107 dred and twenty-four and eighty-six-hundredths feet intersect line 5–6 of said survey No. 8178 at north five degrees and thirty-eight minutes west two hundred and eighty-eight and sixty-five-hundredths feet from corner No. 6; one thousand three hundred and twenty-four and three-tenths feet intersect line 2–3 of said survey No. 7683; one thousand four hundred and ninety-eight and five-tenths feet to corner No. 4.

Thence, fourth course, magnetic variation fourteen degrees and two minutes east, south thirty-four degrees and twenty-eight minutes east two hundred and fifty-one and eighty-five-hundredths feet intersect line 4–1 of said survey No. 7683; three hundred feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand four hundred and ninety-eight and five-tenths feet in length along said Monarch vein or lode.

Beginning for the description of the Mammoth Pearl Lode claim

at corner No. 1, a porphyry stone 2.5 x 1.4 x .6 feet, chiseled 1–7913 with mound of stones, from which said quarter-section corner bears south twenty-two degrees and twenty-three minutes east, three thousand and twenty-eight and fifty-six-hundredths feet distant; corner No. 2 of said survey No. 7683 bears south nineteen degrees and twenty-two minutes west seven hundred and thirteen and eight-tenths feet distant, and corner No. 4 of said Monarch Lode claim bears south thirty-nine degrees and twelve minutes west seventy-eight and two-tenths feet distant.

Thence, first course, magnetic variation fourteen degrees and two minutes east, south fifty-two degrees and forty-two minutes west, two hundred and forty-one and thirty-three-hundredths feet
108 intersect line 2–3 of said survey No. 7683; three hundred and forty-six and thirty-nine-hundredths feet intersect at line 5–6 of said survey No. 8178; six hundred and sixty-five and fifty-eight-hundredths feet intersect line 3–4 of said survey No. 8178, one thousand four hundred and thirty-seven and eighty-seven-hundredths feet to corner No. 2.

Thence, second course, magnetic variation thirteen degrees and three minutes east, north thirty-seven degrees and eighteen minutes west one hundred and fifty feet to a point from which discovery shaft bears north fifty-two degrees and forty-two minutes east three hundred and thirty-five feet distant; also intersect line 4–1 of survey No. 7968, the Coriolanus Lode claim; three hundred feet to corner No. 3.

Thence, third course, magnetic variation thirteen degrees and twelve minutes east, north fifty-two degrees and forty-two minutes east five hundred and sixty-one and seventy-seven-hundredths feet intersect line 4–1 of said survey No. 7968; nine hundred and fifty-seven and thirty-four-hundredths feet intersect line 3–4 of said survey No. 8178; one thousand two hundred and seventy-six and fifty-three-hundredths feet intersect line 5–6 of said survey No. 8178; one thousand four hundred and thirty-seven and eighty-seven-hundredths feet to corner No. 4.

Thence, fourth course, magnetic variation twelve degrees and thirty minutes east, south thirty-seven degrees and eighteen minutes east thirty-three and thirty-nine-hundredths feet intersect line 2–3 of said survey No. 7683; three hundred feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand four hundred and thirty-seven and
109 eighty-seven-hundredths feet in length along said Mammoth Pearl vein or lode. Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claims or surveys Nos. 7683, 7968 and 8178 and also all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground, the granted premises in said lot No. 7913 containing eleven acres and five hundred and seventy-nine-thousandths of an acre of land, more or less.

Now know ye, that there *is* therefore hereby granted by the United

States unto the said J. A. Fiedler and the heirs of L. B. Hammond, deceased, and to their heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Monarch and Mammoth Pearl veins, lodes or ledges and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 7913 extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end line of said lot No. 7913, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges: and provided further, that nothing herein contained shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another.

110 To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantees above named, and to their heirs and assigns forever; subject nevertheless to the above-mentioned and the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

111 In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixth day of September, in the year of our Lord one thousand eight hundred and

ninety-five, and of the Independence of the United States the one hundred and twentieth.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
[SEAL.] *Recorder of the General Land Office.*

Recorded, vol. 260, pages 205 to 210, inclusive.

(Endorsements:) Compared. M. & M. P. M. E. 575. 36843. Ex. C. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this instrument was filed for record in my office at 9.20 o'clock a. m., March 18, 1897, and is duly recorded in Book 196, page 96.

J. W. BATES, *Recorder.*

2.30.

STATE OF COLORADO, } ss:
County of El Paso, }

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado within and for El Paso
112 county, do hereby certify the above and foregoing to be a true, perfect, and complete copy of United States patent—General Land Office No., 26018—issued September 6th, 1895, to J. A. Feidler and the heirs of L. B. Hammond, deceased, introduced as exhibit in case No. 4870, The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company.

In witness whereof I have hereunto set my hand and af-
[SEAL.] fixed the seal of said court, at Colorado Springs, this 5th day of August, 1898.

EDGAR HOWBERT, *Clerk,*
By E. C. DAVIS, *Deputy.*

Revenue stamp.

N. 4–219. H. G. P.
A. B. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 28, 1898.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy from pages 1 to 9, inclusive, of U. S. mineral patent No. 27757, issued in favor of the Calhoun Gold Mining Company upon the Victor Consolidated and Victor Consolidated No. 2 Lode claims, mineral certificate No. 975, Pueblo, Colorado,

land district, is a true and literal exemplification of the record of said mineral patent on file in this office.

In testimony whereof I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,
Commissioner of the General Land Office.

12499b–1 M.

113 General Land Office No., 27757; mineral certificate No. 975.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the certificate No. 975 of the register of the land office at Pueblo, in the State of Colorado, accompanied by other evidence, whereby it appears that the Calhoun Gold Mining Company did, on the third day of September, A. D. 1896, duly enter and pay for that certain mining claim or premises, known as Victor Consolidated and Victor Consolidated No. 2 Lode mining claims, designated by the surveyor general as lot No. 8747 embracing a portion of sections twenty-nine and thirty in township fifteen, south of range sixty-nine west, sixth principal meridian, in the Cripple Creek mining district, in the county of El Paso and State of Colorado, in the district of lands subject to sale at Pueblo, and bounded, described and platted as follows, with magnetic variation thirteen degrees and thirty minutes east.

Beginning for the description of the Victor Consolidated Lode claim at corner No. 1, a granite stone 24 x 10 x 3 inches, chiseled 1–8747 from which corner No. 1 of survey No. 8178, the Apex Lode claim, bears north twenty-three degrees and forty-nine minutes west one hundred and forty-seven and seventy-six-hundredths feet distant, the south quarter corner of section twenty-nine in township
114 fifteen south of range sixty-nine west, sixth principal meridian bears south forty-one degrees and forty-four minutes east two thousand and sixty and three-tenths feet distant, and the mouth of discovery cut and tunnel bears north sixty-four degrees and thirty-two minutes west one hundred and forty-nine and seventy-four-hundred- feet distant.

Thence, first course north eight degrees and fifty-two minutes west three hundred and twenty-two and thirty-eight-hundredths feet intersect line 6–1 of said survey No. 8178 at north two degrees and fifty-nine minutes east one hundred and eighty-four and seven-hundredths feet from corner No. 1; four hundred and forty and eleven-hundredths feet intersect line 3–4 of survey No. 7475 the Dead Pine Lode claim; five hundred and eleven and fifteen-hundredths feet intersect line 2–3 of the Hamburg Lode claim survey No. 8768; six hundred and fifty-nine and three-tenths feet intersect line 1–2 of the Monarch Lode claim survey No. 7913 A. M.; nine

hundred and ninety-two and ninety-three-hundredths feet intersect line 3–4 of said Monarch Lode claim; nine hundred and ninety-three and two-tenths feet intersect line 1–2 of the Mammoth Pearl Lode claim, survey No. 7913 A. M.; one thousand and twenty-two and forty-five-hundredths feet intersect line 3–4 of said Hamburg Lode claim at south eighty degrees and ten minutes east one hundred and thirty-six and seven-hundredths feet from corner No. 4; one thousand three hundred and thirty-three and twenty-seven-hundredths feet intersect line 3–4 of said Mammoth Pearl Lode claim; one thousand five hundred and two and two-tenths feet to corner No. 2.

115 Thence, second course, south seventy-two degrees and forty-four minutes west one hundred and forty-one and sixty-eight-hundredths feet corner No. 4 of said survey No. 8178, from which corner No. 3 of said claim bears south five degrees and thirty-eight minutes east seven hundred and ninety-two and fifty-seven-hundredths feet distant; two hundred and twenty-four and six-hundred-feet intersect line 1–2 of survey No. 7968, the Coriolanus Lode claim, at north fifty-three degrees and forty minutes west one hundred and three and forty-eight-hundredths feet from corner No. 1; three hundred and two and one-tenth feet to corner No 3.

Thence, third course, south ten degrees and twenty-two minutes east one hundred and ninety-nine and five-hundredths feet intersect line 4–1 of said survey No. 7968 at south thirty-seven degrees and forty-five minutes west one hundred and ninety-nine and thirty-eight-hundredths feet from corner No. 1; two hundred and eighty-two and fifty-four-hundredths feet intersect line 3–4 of said Mammoth Pearl Lode claim; three hundred and thirty-eight and eighteen-hundredths feet intersect line 3–4 of the Hallett Lode claim, survey No. 8768 at north eighty degrees and ten minutes west one hundred and sixty-nine and seventy-one-hundredths feet from No. 4; six hundred and two and eight-tenths feet interesect line 3–4 of said Monarch Lode claim; six hundred and nineteen and three-tenths feet intersect line 1–2 of said Mammoth Pearl Lode claim; eight hundred and twenty-nine and sixteen-hundredths feet intersect lines 4–1 of said Hallett and Hamburg Lode claims at south nine degrees and fifty minutes west four hundred and sixty-one and twenty-five-hundredths feet from corners Nos. 4 of said claims; nine

116 hundred and twenty-nine feet intersect line 1–2 of said Monarch Lode claim; one thousand and fifty-nine and one-tenth feet intersect line 2–3 of said survey No. 8178 at south seven degrees and forty minutes west three hundred and three and forty-three-hundredths feet from corner No. 3; one thousand three hundred and seventy and eighteen-hundredths feet intersect line 1–2 of said survey No. 8178, at south sixty-seven degrees forty minutes and thirty seconds west two hundred and thirty-one and forty-seven-hundredths feet from corner No. 1; one thousand four hundred and ninety-six and nine-tenths feet to corner No. 4.

Thence, fourth course, north seventy-two degrees and forty-four minutes east seventy-eight and thirteen-hundredths feet intersect line 2–3 of said Hamburg Lode claim; one hundred and thirty-one

and eleven-hundredths feet intersect line 3–4 of said survey No. 7475, two hundred and sixty-two and twenty-two-hundredths feet to corner No. 1 the place of beginning; the survey of the lode as above described extending one thousand four hundred and ninety-six and nine-tenths feet in length along said Victor Consolidated vein or lode.

Beginning for the description of the Victor Consolidated No. 2 Lode claim at corner No. 1, a pine post four inches square marked 1–8747, with mound of stone from which said quarter-section corner bears south sixty degrees and thirty-nine minutes east three thousand three hundred and seventy-two and nine-tenths feet distant; corner No. 3 of survey No. 8815, the Pearl Macy Lode claim, bears north twenty-three degrees and nine minutes east ninety-three
117 and seventy-nine-hundredths feet distant; a spruce tree ten inches in diameter blazed and marked B. T. 1–8747 bears north twenty-six degrees and thirty-five minutes west five and ninety-five-hundredths feet distant, and a spruce tree eight inches in diameter blazed and marked B. T. 1–8747 bears south five degrees and twelve minutes east ten and seventy-five-hundredths feet distant.

Thence, first course, north fifteen minutes west nine and seventy-one-hundredths feet intersect line 2–3 of said survey No. 8815 at south twenty-five degrees and forty-five minutes west eighty-four and ninety-seven-hundredths feet from corner No. 3; one hundred and fifty and sixty-two-hundredths feet to a point from which discovery shaft bears south seventy-seven degrees and forty-one minutes east one hundred and ninety feet distant, three hundred and one and twenty-four-hundredths feet to corner No. 2.

Thence, second course, south seventy-seven degrees and thirty-eight minutes east ninety and thirty-three-hundredths feet intersect line 2–3 of said survey No. 7968 at north thirty-seven degrees and forty-two minutes east forty-eight and fifty-eight-hundredths feet from corner No. 3; one hundred and seventeen and twenty-five-hundredths feet intersect line 4–1 of survey No. 8617, the Summit Lode claim; two hundred and thirty-three and thirty-two-hundredths feet intersect line 3–4 of survey No. 8088, the Big Theatre Lode claim at north fifty-eight degrees and thirty minutes west six hundred and ninety-six and eighty-one-hundredths feet from corner No. 4; three hundred and eight and eighty-four-hundredths feet intersect line 2–3 of survey No. 8822, the X-10-U-8 Lode claim; four hundred and twenty-one and eleven-hundredths feet intersect
line 4–1 of said survey No. 7968 at north thirty-seven
118 degrees and forty-five minutes east one hundred and eighty and ninety-nine-hundredths feet from corner No. 4; five hundred and fifty-seven and sixty-eight-hundredths feet intersect line 2–3 of said Monarch Lode claim at north thirty-four degrees and twenty-eight minutes west two hundred and thirty-one and eighty-eight-hundredths feet from corner No. 2; six hundred and twenty-three and forty-one-hundredths feet intersect line 4–1 of said survey No. 8822; eight hundred and seventy-four and seventy-six-hundredths feet intersect line 1–2 of said Monarch Lode claim, at north

fifty-five degrees and thirty-two minutes east two hundred and sixteen and ninety-one-hundredths feet from corner No. 2; nine hundred and eighty-three and twenty-three-hundredths feet intersect line 2–3 of said Hallett Lode claim; nine hundred and ninety-five and sixteen-hundredths feet intersect line 4–1 of said survey No. 8088 at north thirty-six degrees and forty-five minutes east two hundred and fifty and seventy-six-hundredths feet from corner No. 4; one thousand one hundred and fifty-five and four-tenths feet intersect lines 4–1 of said Hallett and Hamburg Lode claims; one thousand two hundred and forty-two and twenty-eight-hundredths feet intersect line 2–3 of said survey No. 8178 at north seven degrees and forty minutes east one hundred and forty-eight and nineteen-hundredths feet from corner No. 2; one thousand four hundred and fifty-five and sixty-nine-hundredths feet intersect line 2–3 of said Hamburg Lode claim; one thousand four hundred and fifty-eight and six-tenths feet to corner No. 3, from which corner No. 1 of said Victor Consolidated Lode claim bears south fifty-four degrees and one minute east one hundred and seventy-nine and thirty-two-hundredths feet distant.

119 Thence, third course, south fifteen minutes east five and ninety-five-hundredths feet intersect line 1–2 of said survey No. 8178 at north sixty-seven degrees forty minutes and thirty seconds east two hundred and forty-nine and nine-tenths feet from corner No. 2; one hundred and fifty-four and twenty-two-hundredths feet intersect line 2–3 of survey No. 8787, the Molican Lode claim; two hundred and ninety-eight and fifty-one-hundredths feet to corner No. 4 situate on line 3–4 of said survey No. 7475.

Thence, fourth course, north seventy-seven degrees and forty-four minutes west fifty-five and twenty-two-hundredths feet intersect line 2–3 of said Hamburg Lode claim; two hundred and seventy-seven and six-tenths feet intersect line 2–3 of said survey No. 8787; three hundred and fifty-five and forty-nine-hundredths feet intersect line 4–1 of said Hamburg and Hallett Lode claims; five hundred and twenty-seven and sixty-four-hundredths feet intersect line 2–3 of said Hallett Lode claim; eight hundred and two and sixty-three-hundredths feet intersect line 4–1 of said survey No. 8822; nine hundred and twenty-six and twelve-hundredths feet intersect line 3–4 of survey No. 7931, the Nellie V. Lode claim at south thirteen degrees and twenty minutes west two hundred and two and thirty-four-hundredths feet from corner No. 3; one thousand one hundred and fifteen and forty-five-hundredths feet intersect line 2–3 of said survey No. 8822; one thousand one hundred and fifty-eight and sixty-nine-hundredths feet intersect line 4–1 of said survey No. 8815 at south twenty-five degrees and forty-five minutes west twenty-six and one-tenth feet from corner No. 4; one thousand two hundred and thirteen and two-tenths feet intersect line 1–2 of said survey No. 7931 at

120 south thirteen degrees and twenty-two minutes west one hundred and thirty-seven and thirty-three-hundredths feet from corner No. 2; one thousand four hundred and twenty-eight and sixty-six-hundredths feet intersect line 41 of said survey No. 8617; one thousand four hundred and fifty-eight feet to corner No. 1 the

place of beginning; the survey of the lode as above described extending one thousand four hundred and fifty-eight feet in length along said Victor Consolidated No. 2 vein or lode. Expressly excepting and excluding from these presents all that portion of the ground, hereinbefore described, embraced in said mining claims or surveys Nos. 7475, 7931, 7968, 8088, 8178, 8617, 8787, 8815, 8822; the Monarch and Mammoth Pearl Lode claims, survey No. 7913 Am., the Hallett and Hamburg Lode claims, survey No. 8768, and that portion of said Victor Consolidated No. 2 Lode claim relinquished to the Ithica Tunnel site, described as follows: Beginning at a point on line 4–1 of said Victor Consolidated No. 2 Lode claim north seventy-seven degrees and forty-four minutes west five hundred and thirty-two and two-tenths feet from corner No. 4; thence north four degrees and forty-five minutes east nine and eight-tenths feet; thence north four degrees and fifteen minutes west twenty-five and seventy-five-hundredths feet; thence north twenty degrees east thirty-two and one-tenth feet; thence north seventy degrees west ten feet; thence south twenty degrees west fifty-nine feet; thence south forty-nine degrees and forty-three minutes east nineteen and thirty-five-hundredths feet to a point on line 4–1 of said Victor Consolidated No. 2 Lode claim; thence south seventy-seven degrees
121 and forty-four minutes east five feet to the place of beginning; and also all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground, the granted premises in said lot No. 8747 containing two acres and two hundred and seventy-nine-thousandths of an acre of land, more or less.

Now know ye, that there *is* therefore hereby granted by the United States unto the said The Calhoun Gold Mining Company and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Victor Consolidated and Victor Consolidated No. 2 veins, lodes or ledges, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises, in said lot No. 8747 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, that the right of possession to such outside parts of said veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 8747 so continued in their own direction that such plane will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

122 To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named, and to its successors and assigns forever; subject, neverthe-

less, to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

123 In testimony whereof I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the eighth day of January, in the year of our Lord one thou-
[L. S.] sand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
L. Q. C. LAMAR,
Recorder of the General Land Office.

Endorsed: "Exhibit D." Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

N.
A. B. B. 4–219. H. G. P.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 30, 1898.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, from pages 1 to 11, inclusive, of application for patent, proof of publication, application to
124 purchase, and receiver's receipt *in re* mineral entry No. 975, the Victor Consolidated and Victor Consolidated No. 2 Lode claims, Pueblo, Colorado, land district, is a true and literal exemplification of said papers on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,
[SEAL.] *Commissioner of the General Land Office.*

12,499b–1 m.

Endorsed: Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

Application for Patent.

STATE OF COLORADO, }
County of ——, } *ss:*

EX. E.

Application for patent for the Victor Consolidated and Victor Consolidated No. 2 mining claims.

To the register and receiver of the U. S. land office at Pueblo, Colo.:

R. Huy, whose P. O. address is Cripple Creek, Colo., being duly sworn according to law, deposes and says that in virtue of a compliance with the mining rules, regulations, and customs he is the duly authorized agent of the Victor Consolidated Gold Mining and Milling Company, applicant for patent herein, having become
125 the owner of and being in the actual, quiet, and undisturbed possession of 1,500 linear feet of the Victor Consolidated lode and 1,458.6 linear feet of the Victor Consolidated No. 2 vein, lode, or deposit, bearing gold and silver, together with surface ground 300 feet in width for the convenient working thereof, as allowed by local rules and customs of miners, said mineral claim, vein, lode, or deposit and surface ground being situate in Cripple Creek mining district, county of El Paso, and State of Colorado, and being more particularly set forth and described in the official field-notes of survey thereof hereto attached, dated April 21st, A. D. 1894, and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of the Victor Consolidated Gold Mining and Milling Co. to said mining claim, vein, lode, or deposit and surface ground so surveyed and platted are substantially as follows, to wit, by purchase, which will more fully appear by reference to the copy of the original record of location and the abstract of title herewith filed, the value of the labor done and improvements made upon said Victor Consolidated and Victor Consolidated No. 2 claims by claimants being equal to the sum of five hundred dollars. Said improvements consist of the discovery cut of the Victor Consolidated, a shaft in same, an open cut and tunnel, discovery shaft of Victor Consolidated No. 2 lode, and a drift from bottom of same, but expressly excepting and excluding from this application area in conflict with surs. Nos.

7475, 7913, 7931, 7968, 8088, and 8178, in consideration of which facts and in conformity with the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, ap-
126 plication is hereby made for and in behalf of said Victor Consolidated Gold Mining and Milling Company for a patent from the United States for the said Victor Consolidated and Victor Consolidated No. 2 mining claims, veins, lodes, deposits, and the surface ground so officially surveyed and platted.

R. HUY,
Agent for the Victor Consolidated Gold Mining and Milling Co.

Subscribed and sworn to before me this 21 day of April, A. D. 1894, and I hereby certify that I consider the above deponent a credible and reliable person, and the foregoing affidavit, to which was attached the field-notes of survey of the Victor Consolidated and Victor Consolidated No. 2 mining claims, was read and examined by him before his signature was affixed thereto and the oath made by him.

EDWARD P. ARTHUR,
[SEAL.] *Notary Public.*

My commission expires Feb. 8th, 1898.

Endorsed: No. 738. Application for patent and field-notes of survey. Victor Consolidated and Victor Consolidated No. 2 mining claims. The Victor Consolidated Gold Mining & Milling Co., by W. H. Blackburn, agent, applicant. U. S. L. O., Pueblo, Colo. Received, 9 o'clock a. m., $10.00, Apr. 23, 1894, from A. H. Weber, [mail]* counter.

Proof of Publication.

STATE OF COLORADO, }
County of El Paso, } ss:

A. A. McKnight, being first duly sworn, deposes and says that he is the business m'g'r of the Weekly Journal, a newspaper published at Cripple Creek, in El Paso county, in the State of Colorado; that the notice of the application for a patent for the Victor Con-
127 solidated and Victor Consolidated No. 2 mining claims, of which a copy is hereto attached, was first published in said newspaper in its issue dated the 29th of April, 1894, and was published in each ([daily or]* weekly) issue of said newspaper for ([sixty consecutive days]* or ten consecutive weeks thereafter) the full period of sixty days, the last publication thereof being in the issue dated the 1st of July, 1894.

A. A. McKNIGHT.

[* Words enclosed in brackets erased in copy.]

Subscribed and sworn to before me this eleventh of February, A. D. 1896.

My commission expires Jan. 7, 1899.

CORELON B. HICKMAN,

[SEAL.] *Notary Public.* [SEAL.]

Endorsed: Proof of publication. U. S. L. O., Pueblo, Colo. Received, — o'clock — m., Feb. 15, 1898, from —— ——, mail counter.

Ex. E 2.

Mining Application No. 738.

(Survey No. 8747.)

U. S. LAND OFFICE, PUEBLO, COLO., *April* 23, 1894.

Notice is hereby given that the Victor Consolidated Gold Mining and Milling Company, by its agent, R. Huy, whose post-office is P. O. box 333, Cripple Creek, has made application for a patent for 1,500 linear feet on the Victor Consolidated lode and 1,458.6 linear feet on the Victor Consolidated No. 2 lode, bearing gold and silver, with surface ground 300 feet in width, situate in Cripple Creek mining district, El Paso county, State of Colorado, and described in the plat and field-notes on file in this office as follows, viz: Victor
128 Consolidated lode beginning at cor. No. 1, whence the S. ¼ cor. of sec. 29, twp. 15 S., R. 69 W., of the 6th P. M., bears S. 41 deg. 44 min. E. 2,060.3 ft.; thence N. 80 deg. 52 min. W. 1,502.2 ft. to cor. No. 2; thence S. 72 deg. 44 min. W. 302.1 ft. to cor. No. 3; thence S. 10 deg. 22 min. E. 1,496.6 ft. to cor. No. 4; thence N. 72 deg. 44 min. E. 262.22 ft. to place of beginning; Victor Consolidated No. 2 lode beginning at cor. No. 1, whence the S. ¼ cor. of sec. 28, twp. 15 S., R. 69 W., of the 6th P. M., bears S. 60 deg. 39 min. E. 3,372.9 ft.; thence N. 0 deg. 15 min. W. 301.24 ft. to cor. No. 2; thence S. 77 deg. 38 min. E. 1,458.6 ft. to cor. No. 3; thence S. 0 deg. 15 min. E. 298.51 ft. to corner No. 4; thence N. 77 deg. 44 min. W. 1,458 ft. to cor. No. 1, the place of beginning, containing 19.443 acres, expressly excepting and excluding all conflict with surveys Nos. 7475, 7913, 7931, 7968, 8088, 8617, and 8178, without waiver of lode-claim rights, net area 5.835 acres, and forming a portion of the W. ½ of sec. 29 and the S. E. ¼ of sec. 30, twp. 15 S., R. 69 W., of the 6th P. M., said location being recorded in vol. 8, pages 168 and 191, of the Records of El Paso County, Colorado.

RAYMOND MILLER, *Register.*

First publication, April 29, 1894; last publication, July 1, 1894.

Ex. F.

Application to Purchase.

To the register and receiver United States land office at Pueblo, Colorado:

The undersigned, claimant under the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and
129 legislation supplemental thereto, hereby applies to purchase that mining claim known as the Victor Consolidated lode and the Victor Consolidated No. 2 lode, situate in sections 29 & 30, in township No. 15 S., of range No. 69 W., 6th P. meridian, designated as lot No. 8747, said lot No. 8747 extending 1,496.9 feet in length along said Victor Consolidated lode and 1,458 feet in length along said Victor Consolidated No. 2 lode vein or lode, but expressly excepting and excluding from this application all that portion of the ground embraced in mining claims or surveys designated as lots Nos. 7475, Dead Pine lode; 7913, Monarch and Mammoth Pearl lodes; 7968, Coriolanus lode; 8178, Apex lode; 7931, Nellie V. lode; 8088, Big Theatre lode; 8787, Mohican lode; 8822, X-10-U-8 lode; 8617, Summit lode; 8768, Hallett and Hamburg lodes, and also that portion of 8815, Pearl Macy lode, described as follows: Beginning at cor. No. 1, sur. No. 8747, Victor Consolidated No. 2 lode, thence N. 0 15′ W. 9.71 ft.; thence N. 25 45′ E. 50.97 ft.; thence S. 64 40′ E. 240.32 ft.; thence S. 13 22′ W. 4.70 ft.; thence N. 77 44′ W. 243.79 ft. to place of beginning, containing 0.182 acres, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground, said lode mining claim embracing 3.460 acres [and said mill-site claim — acres],* in the Cripple Creek mining district, in the county of El Paso and State of Colorado, as shown by the survey thereof, and hereby agree to pay therefor twenty dollars, being the legal price thereof.

A. H. WEBER, *Agent.*
THE CALHOUN GOLD MINING CO.,
By A. H. WEBER, *V. President.*

Dated Sept. 1, 1896.

M. A. 738.
M. E. 975.

I, Raymond Miller, register of the land office at Pueblo,
130 Colorado, do hereby certify that the aforesaid mining claim or lot No. 8747, as applied for above, is subject to entry by the above-named applicant, the area of said lode mining claim being 3.460 acres [and of said mill-site claim — acres]* and the legal price thereof twenty dollars.

RAYMOND MILLER, *Register.*

September 3, 1896.

[* Words enclosed in brackets erased in copy.]

Endorsed: Application to purchase. M. E. No. 975. Victor Consolidated *et al.* Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

Ex. G.

(4–145.)

Receiver's Receipt.

(Duplicate to be given the purchaser.)

Mineral entry No. 975, lot No. 8747.

UNITED STATES LAND OFFICE AT
PUEBLO, COLO., *September* 3, 1896.

Patent to contain reservation according to proviso to the act of August 30, 1890.

Received from the Calhoun Gold Mining Company the sum of twenty dollars, the same being payment in full for the area embraced in that mining claim known as the Victor Consolidated and Victor Consolidated No. 2 lodes, forming a part of sections 29 and 30, in township 15 south, of range No. 69 west, of 6 principal meridian, designated as lot No. 8747, said lot No. 8747 extending 1,496.9 feet in length along said Victor Consolidated lode and 1,458 feet in length along said
131 Victor Consolidated No. 2 vein or lode, expressly excepting and excluding from this sale and entry all that portion of the ground embraced in mining claim or survey designated as lots No. 7475, Dead Pine lode; 7913, Monarch and Mammoth Pearl lodes; 7968, Coriolanus lode; 8178, Apex lode; 7931, Nellie V. lode; 8088, Big Theatre lode; 8787, Mohican lode; 8822, X-10-U-8 lode; 8617, Summit lode; 8768, Hallett and Hamburg lodes; also that portion of 8815, Pearl Macy lode, described as follows: Beginning at cor. No. 1, sur. 8747, Victor Consolidated No. 2 lode, thence N. 0 15′ W. 9.71 ft.; thence N. 25 45′ E. 50.97 ft.; thence S. 64 40′ E. 240.32 ft.; thence S. 13 22′ W. 4.70 ft.; thence N. 77 44′ W. 243.79 ft. to place of beginning, containing .182 of an acre, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground, said lode mining claim as entered embracing 3,460 acres [and said mill-site claim — acres],* in the Cripple Creek mining district, in the county of El Paso and State of Colorado, as shown by the survey thereof.

JOHN J. KEY, *Receiver.*

$20.00.
6–375.

Endorsed: Ex's E, F, & G. Receiver's receipt in mineral entry No. 975, in case of the mining claim known as the Victor Consolidated and Victor Consolidated No. 2 lodes, Cripple Creek mining

[* Words enclosed in brackets erased in copy.]

district, lot No. 8747. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

132 "Copy."

Location Certificate.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents that Clarence Stanley, the undersigned, has this 24th day of October, 1893, located and claimed and by these presents does locate and claim, by right of discovery and location, in compliance with the mining acts of Congress approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations, 1,500 linear feet and horizontal measurement on the Victor Consolidated lode, vein, ledge, or deposit along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with 150 feet on the easterly side and 150 feet on the westerly side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim 125 feet running S. 11 30′ from center of discovery cut and 1,375 feet running N. 11 30′ W. from center of discovery cut, said discovery being situate upon said lode, vein, ledge, or deposit and within the lines of said claim, in Cripple Creek mining district, county of El Paso and State of Colorado, described by metes and bounds as follows, to wit: Beginning at corner No. 1, whence cor. No. 1 of U. S. sur. No. 8178, Apex lode, bears N. 39 05′ W. 158.9 feet, the ¼ sec. cor. bet. sections 29 & 32, tp. 15 S., R. 69 W., of the 6th principal meridian, bears S. 40 19′ E. 2,378.4 ft.; thence N. 11 30′ W. 750 feet to east side center stake and 1,500 ft. to N. E. cor. No. 2, a post; thence S. 71 50′ W. 302.4 ft. to corner No. 3, a post; thence S. 11 30′
133 E. 750 ft. to west side center post and 1,500 feet to corner No. 4, a post, which is also the north center side stake of the Mohican lode; thence N. 71 50′ E. along the north side line of the Mohican lode 302.4 ft. to cor. No. 1, the place of beginning. Variation 13 45′ E. From the center of the north end line cor. No. 4, U. S. survey No. 8178, bears N. 71 50′ E. 10 ft. dist. Bull mountain bears N. 14 E.

CLARENCE STANLEY. [SEAL.]

Said lode was discovered on the 24th day of October, A. D. 1893.
Attest: THOS. L. DARBY.

Date of location, October 24th, A. D. 1893.
Date of certificate, Oct. 28th, A. D. 1893.

Endorsed: "Ex. H." Location certificate on the Victor Consolidated lode. Mining claim of —— ——, in —— mining district, —— county, State of Colorado.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this location certificate was filed for record in my office at 10.05 o'clock a. m., Nov. 2d, 1893, and is duly recorded in Book 8, at page 168.

F. W. HOWBERT, *Recorder,*
By ——— ———, *Deputy.*

Fees, $—.

Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898.

EDGAR HOWBERT, *Clerk.*
By E. K. GAYLORD, *Deputy.*

STATE OF COLORADO, } ss:
County of El Paso, }

134 I, W. T. Liggett, county clerk and recorder in and for the aforesaid county and State, do hereby certify that the within and foregoing is a full, true, and correct copy of location certificate of the Victor Consolidated lode. Filed for record at 10.05 a. m., Nov. 2, 1893, and duly recorded in Book 8, at page 168, of the records of El Paso county, Colorado; made from the original [paper]* record.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office in Colorado Springs, in said county and State, this 23rd day of May, A. D. 1898.

[SEAL.]

W. T. LIGGETT,
County Clerk and Recorder.
By MOLLIE GREGORY, *Deputy.*

Notice.

The Calhoun Gold Mining Company, owner of the Ithica Tunnel site, claims fifteen hundred feet on the Ithica Tunnel lode No. 1, being seven hundred and fifty feet in a southerly direction, on the corner of said lode from the centre of the Ithica tunnel, and seven hundred and fifty feet in a northerly direction on the corner of said vein from the centre of said tunnel at its intersection with said vein, together with one hundred and fifty feet on each side of the centre of said vein at the surface. Said vein was discovered in said tunnel September 19th, 1895, at a point in said tunnel 138 feet from
135 the mouth of the tunnel, and is claimed, with all the dips, spurs, and angles, by virtue of the location of and diligent prosecution of work in said tunnel and the discovery of the vein therein. This notice is placed immediately over the point of discovery in said tunnel, as near as may be, allowing for the apparent dip of said vein.

THE CALHOUN GOLD MINING COMPANY,
By [BEN. G. BROOKS,]* *Manager.*

[October,]* 1895.

Cripple Creek mining district, Dec. 15th, '95.

[* Word enclosed in brackets erased in copy.]

Endorsed: Tunnel. "Ex. I." Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this instrument was filed for record in my office at 10.58 o'clock a. m., Dec. 26, 1895, and is duly recorded in Book 228, page 62.

F. W. HOWBERT, *Recorder.*

Fee, 50c.

W. H. BLACKBURN,
1767 *Vine St., Denver.*

Location Certificate of Tunnel

To all whom these presents may concern:

Know ye, that I, A. H. Weber, a citizen of the United States, of Denver, county of Arapahoe, State of Colorado, do hereby declare and publish as a legal notice to all the world, that I have a valid right to the occupancy, possession and enjoyment of the Ithica tunnel and tunnel site, located August 19th, 1895, A. D., for the discovery of mines and the development of lodes, and situate in
136 Cripple Creek mining district, El Paso county, State of Colorado, described as follows, to wit:

Mouth of tunnel situate on the south slope of the ridge connecting Battle mountain with Squaw mountain in the southwest quarter of section 29 T. 15 S. R. 69 W. of the 6th P. M. and from the center of the mouth of the tunnel the S. ¼ cor. of sec. 29 T. 15 S. R. 69 W. bears S. 48 34 E. 2,721.5 cor. No. 4 of sur. No. 8747 Victor Consolidated No. 2 lode bears S. 74 17′ E. 545.5 cor. No. 3 of sur. No. 7931 Nellie V. lode bears N. 53 31′ W. 415.6.

Size of tunnel 8 ft. wide by 7 ft. high in the clear.

Course of tunnel from its mouth N. 10 W. 35 ft. to a stake and running thence N. 20 E. 2,965 ft. to the north end of said tunnel at which point is set a substantial stake, being the end stake and marked 30, and between the tunnel mouth and end stake the center line of the tunnel is marked by substantial stakes set every 100 ft. and numbered consecutively 0, 035, 1, 2, 3, 4, 5, and so on to 30 and the line is cleared of trees and brush for its entire distance.

From the north end stake numbered 30 the smokestack of the Elkton mine bears S. 89 25′ W. The smokestack of the Moose mine bears N. 52 39′ W. The southeast corner of the Bertha B. lode bears N. 39 54′ W. and a mountain peak bears N. 72 38′ W.

And I claim for line of tunnel 750 ft. on each side of the center of the bore or course of the tunnel, and the right to all lodes which may be discovered in the due prosecution of said tunnel within 750 ft. on each side of the center of said line.

And I also claim a square track of land 125 ft. on each side of the mouth of the tunnel and extending 250 ft. immediately below the

mouth of the tunnel for *for* dumping purposes. Together
137 with all — singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all rights granted to the locator as tunnel rights under the terms of section 2323 of the Revised Statutes of the United States.

A. H. WEBER. [SEAL.]

STATE OF COLORADO, }
County of Arapahoe, } ss:

Before me, the subscriber, a notary public in and for said county, personally appeared A. H. Weber, to me personally known to be the same person described in and who executed the within declaration of occupation, and acknowledged that he signed, sealed, and published the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal this 10th day of August, A. D. 1895.

My commission expires M'ch 21, 1898.

PRESTON H. BARKER,
[SEAL.] *Notary Public.*

Endorsed: Ex. J. Location certificate of Ithica tunnel and tunnel site. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

STATE OF COLORADO, }
County of El Paso, } ss:

I hereby certify that this instrument was filed for record in my office at 9.05 o'clock a. m. Aug. 20, 1895, and is duly recorded in Book 214, page 324.

F. W. HOWBERT, *Recorder.*

75c. pd.

138 *Additional and Amended Location Certificate.*

STATE OF COLORADO, }
County of El Paso, } ss:

Know all men by these presents that the Calhoun Gold Mining Company has this day amended, located, and claimed, and by these presents does amend, locate, and claim, by right of the Ithica Tunnel site, discovery and location of the vein, and this additional and amended location certificate, in compliance with the mining acts of Congress approved May 10th, 1872, and all subsequent acts, and with section 2409 of the General Statutes of Colorado, and with local customs, laws, and regulations, fifteen hundred (1,500) linear feet, horizontal measurement, on the Ithica Tunnel No. 2 lode, along the vein thereof, with all its dips, angles, and variations, together with the surface ground one hundred and fifty (150) feet on each side of the middle of said vein; said lode so located and claimed is more particularly described as follows, to wit:

22485

Beginning at a point in the Ithica tunnel one hundred sixty-five (165) feet from the face of said tunnel and extending from said point seven hundred fifty (750) feet southeasterly and seven hundred fifty (750) feet northwesterly. The bearing of said lode is about north 35 30′ west. The surface ground claimed with said lode is described as follows, to wit:

Beginning at corner No. 1,
Thence N. 54 30′ E. 300 feet;
Thence N. 35 30′ W. 1,500 feet;
Thence S. 54 30′ W. 300 feet;
Thence S. 35 30′ E. 1,500 feet;

to corner No. 1, place of beginning, variation 13 30′ east, said
139 point of discovery in said tunnel being at the centre and within the lines of said claim and situate on the southern slope of Battle mountain, in the Cripple Creek mining district, county of El Paso, State of Colorado.

This being the same lode originally discovered in said tunnel on the 27th day of Sept., 1895, and recorded in Book 228, page 62, in the office of the recorder of said county. This further additional and amended location certificate is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original description, location, or record, and of taking in and acquiring all forfeited or abandoned overlapping ground, and of taking in any part of any overlapping claim which has been abandoned, and of securing all the benefit of sec. 2409 of the General Statutes of Colorado.

Date of additional and amended location certificate, the 18th day of June, A. D. 1897.

THE CALHOUN GOLD MINING COMPANY,
[SEAL.] By A. H. WEBER, *Vice-President.*

Attest: JAMES QUINN, JR., *Secretary.*

Endorsed: Compared. "Ex. J." 41397. Additional & amended location certificate, Ithica Tunnel No. 2 lode, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 3.25 o'clock p. m., June 22, 1897, and is duly recorded in Book 264, page 33 *et seq.* J. W. Bates, recorder. .75.

140 *Location Certificate.*

(Lodes discovered in a tunnel.)

STATE OF COLORADO, } *ss:*
County of El Paso, }

Know all men by these presents that we, the Calhoun Gold Mining Co., owner of the Ithica Tunnel site, the undersigned, have this 20th day of December, A. D. 1895, located and claimed, and by these

presents do locate and claim, and by right of discovery and location, in compliance with the mining acts of Congress approved May 10th, 1872, and all subsequent acts and with local customs, laws, and regulations, 1,500 linear feet and horizontal measurement on the Ithica Tunnel No. 3 lode, vein, ledge, or deposit along the vein thereof, with all its dips, angles, and variations as allowed by law, together with the amount of surface ground necessary for working the same and allowed by law, 750 feet of said lode so located lying and being southeasterly of the discovery on said lode and 750 feet being northwesterly of said discovery, said lode, vein, ledge, or deposit lying and being in the Cripple Creek mining district, county of El Paso and State of Colorado, and being more particularly described as follows, to wit:

Beginning at a point in the Ithica tunnel 356 feet from the mouth or entrance of said tunnel and extending from said point 750 feet northwesterly and 750 feet southeasterly.

THE CALHOUN GOLD M'G CO. [SEAL.]

Said lode was discovered on the 20th day of December, A. D. 1895.

Date of location, December 20th, A. D. 1895.

Date of certificate, —— —, A. D. 189–.

141 Endorsed: "Ex. K." Location certificate, lodes discovered in a tunnel. In the —— mining tunnel of ——, in —— mining district, —— county, State of Colorado.

STATE OF COLORADO, } ss:
County of El Paso, }

I hereby certify that this location certificate was filed for record in my office at 10.57 o'clock a. m., Dec. 26, 1895, and is duly recorded in Book 228, at page 61.

F. W. HOWBERT, *Recorder.*

Fees, $.75.

Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16th, 1898.

EDGAR HOWBERT, *Clerk,*
By E. K. GAYLORD, *Deputy.*

Ret., 50c.

The Ithica Tunnel Lode No. 4 Mining Claim.

STATE OF COLORADO, } ss:
County of El Paso, }

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel Lode No. 4, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode

ledge, or deposit from its intersection with said tunnel, together with — feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 20th day of November, A. D. 1895, at a point 250 feet from the face or mouth of said tunnel, and is claimed with all the dips,
142 spurs, and angles by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate, this 21st day of December, A. D. 1896.

[SEAL.] THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest: JAMES QUINN, JR., *Secretary.*

Endorsed: Compared. "Ex. L." 31472. Location certificate, Ithica Tunnel Lode No. 4, by Calhoun Gold Mining Co. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.10 a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 103. J. W. Bates, recorder. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy.

143 *The Ithica Tunnel Lode No. 5 Mining Claim.*

STATE OF COLORADO, *County of El Paso,* } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel Lode No. 5, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 4th day of August, A. D. 1896, at a point 581 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles by virtue of the location of said tunnel, *g*iligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate, this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest:

[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: Compared. "Ex. M." 31473. Location certificate, Ithica Tunnel Lode No. 5, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.11 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 103. J. W. Bates, recorder. .50.

144 *The Ithica Tunnel Lode No. 6 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed and does hereby claim 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 6, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 16th day of August, A. D. 1896, at a point 643 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles, by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest.
[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. N." Compared. 31471. Location certificate, Ithica Tunnel lode No. 6, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.12 o'clock a. m., Dec. 22nd, 1896, and is duly recorded in Book 258, page 104. J. W. Bates, recorder. .50.

145 *The Ithica Tunnel Lode No. 7 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue

of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed and does hereby claim 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 7, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 22nd day of August, A. D. 1896, at a point 681 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles, by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest:
[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. O." Compared. 31475. Location certificate, Ithica Tunnel lode No. 5, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.13 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 104. J. W. Bates, recorder. .50.

146 *The Ithica Tunnel Lode No. 8 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 8, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with — feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 16th day of October, A. D. 1896, at a point 927 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles, by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895,

and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest:
[SEAL.] JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. P." Compared. 31476. Location certificate, Ithica Tunnel lode No. 8, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this instrument was filed for record in my office at 8.14 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 105. J. W. Bates, recorder. .50.

147 *The Ithica Tunnel Lode No. 9 Mining Claim.*

STATE OF COLORADO, }
County of El Paso, } *ss:*

Know all men by these presents that the Calhoun Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, owner of the Ithica Tunnel site, has located and claimed, and does hereby claim, 1,500 linear feet and horizontal measurement on the Ithica Tunnel lode No. 9, being 750 feet northwesterly and 750 feet southeasterly on said vein, lode, ledge, or deposit from its intersection with said tunnel, together with 150 feet on each side of the apex of said vein at the surface. The said vein, lode, ledge, or deposit was discovered in said tunnel on the 28th day of October, A. D. 1896, at a point 961 feet from the face or mouth of said tunnel, and is claimed with all the dips, spurs, and angles by virtue of the location of said tunnel, diligent work, and the discovery of said vein therein.

Said tunnel was located on the 19th day of August, A. D. 1895, and the face thereof is situate on the southern slope of Battle mountain, in Cripple Creek mining district, El Paso county, Colorado.

Date of this certificate this 21st day of December, A. D. 1896.

[SEAL.] THE CALHOUN GOLD MINING COMPANY,
By A. H. WEBER, *Vice-President.*

Attest: JAMES QUINN, JR., *Secretary.*

Endorsed: "Ex. Q." Compared. 31477. Location certificate, Ithica Tunnel lode No. 9, by Calhoun Gold Mining Co. Filed in the district court of El Paso county, Colorado, Jul- 6, 1898, as of May 16, 1898. Edgar Howbert, clerk, by E. K. Gaylord, deputy. State of Colorado, county of El Paso, *ss:* I hereby certify that this

instrument was filed for record in my office at 8.15 o'clock a. m., Dec. 22, 1896, and is duly recorded in Book 258, page 105. J. W. Bates, recorder. .50.

148 The plat marked Exhibit "A" and referred to in the stipulation herein, dated March 24, 1898, which said plat was offered in evidence and has heretofore been filed, being too large to attach to this bill of exceptions, is, however, incorporated herein by reference and is separately transmitted.

And thereafter and on the same day the court did find—

That the matters and things stated in the complaint are true, and that the plaintiff is and at the commencement of this suit was the owner in fee of the Apex, Mammoth Pearl, and Monarch Lode mining claims in the complaint described, and was entitled to the sole and exclusive, peaceable and undisputed possession of each and every part thereof, including all veins, lodes, or ledges having their tops or apexes therein; but that defendant, without plaintiff's knowledge or consent, entered into and upon a portion of plaintiff's premises, below the surface thereof, and extended its excavations, the Ithica tunnel in the pleadings mentioned, about 900 feet therein; that in said tunnel defendant cut several veins of mineral-bearing rock in place, and took out and removed therefrom and converted to its own use a large quantity of ore belonging to plaintiff, being of the value of $400.00; that the defendant was at the commencement of this action further extending said excavation or tunnel into plaintiff's said premises and taking out and removing additional ore therefrom, and was threatening to continue said wrongful acts.

And did further find that at and prior to the commencement of this action defendant was the owner in fee of the Victor Consolidated Lode mining claim in the answer described, and that the apex of the vein thereof exposed in the discovery shaft is continuous throughout the length of said claim, and is a cross-vein
149 on the strike to plaintiff's Monarch and Mammoth Pearl and the veins thereof and the vein of the Apex claim; that the vein of the said Victor Consolidated claim was not known to exist prior to its discovery in said discovery shaft by defendant and its grantors.

That prior to the commencement of this action and on, to wit, the 19th day of August, 1895, the defendant located a tunnel site called the Ithica Tunnel site, under section 2323 of the Revised Statutes of the United States, and thereafter prosecuted work in said tunnel with great diligence until enjoined by order of this court, and that said tunnel has reached a depth of 1,365 feet from the face thereof; that the face of said tunnel at the date of its location was upon unappropriated public domain, and the line thereof crosses plaintiff's claims, and also the territory originally in conflict between them and defendant's Victor Consolidated claim; that the veins cut by said tunnel within the side lines of plaintiff's claims do not appear on the surface and were not known to exist prior to the location of said tunnel site; that the location of said Ithica Tunnel site was long subsequent to the location of each and every of plaintiff's said lode

claims, and was also subsequent to the issue of patent by the United States Government for plaintiff's said Apex Lode mining claims, and also subsequent to the issuance and delivery of the receiver's receipt and final entry in the United States Land Office of plaintiff's said Monarch and Mammoth Pearl Lode mining claims, but said tunnel was located prior to the issuance of patents for said Monarch and Mammoth Pearl claims; that the location of defendant's Victor Consolidated claim was subsequent to the location of each and every of plaintiff's said lode mining claims, and was also subsequent to the application for patent in the United States Land Office therefor and while said patent proceedings were pending.

150

And did further find that in the application to the United States Land Office for patent to defendant's said Victor Consolidated Lode claim, and also in the application to said land office to purchase the same, likewise in the receiver's receipt issued upon the final entry thereof, and from the grant contained in the United States patent issued thereto, all of the surface contained in each and every of plaintiff's said lode claims conflicting with the said Victor Consolidated Lode claim, together with all veins, lodes, or ledges having their tops or apexes in said conflicting surface, was expressly excluded and excepted, and that all of said surface so in conflict between the plaintiff's said mining claims and the said Victor Consolidated Lode mining claim of defendant, together with all of said veins, lodes, or ledges having their tops or apexes therein, was included in the grant and conveyed by the United States patents issued for plaintiff's said lode claims.

To which findings of law and of fact, save and except such facts as are expressly admitted in the pleadings and in the stipulation herein, and each and every thereof, the defendant, by its counsel, then and there duly excepted.

And the court did then order, adjudge, and decree that plaintiff is the owner in fee and is entitled to the exclusive, peaceable, and undisturbed possession of said premises, to wit, the said Apex Lode mining claim, patent survey No. 8178, and the said Monarch and Mammoth Pearl Lode mining claims, patent survey No. 7913, in Cripple Creek mining district, El Paso county, Colorado, together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims extended downward vertically, and that plaintiff do have and recover of and from defendant its damages for said wrongful entry therein and for said injuries thereto in the sum of $400.00, together with its costs of suit herein laid out and expended, and that execution issue therefor.

151

And the court did further order, adjudge, and decree that the temporary injunction heretofore issued herein, enjoining and restraining defendant, its officers, agents, and employés, from further prosecuting or extending said tunnel, and from entering upon or within or underneath plaintiff's claim, and from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within

the side and end lines of plaintiff's said claims extended downward vertically, be, and the same is hereby, made perpetual, and that defendant, its officers and employés, be, and they are hereby, forever enjoined from the renewal of each or any of said wrongful acts.

To which order and decree of the court and to each and every part thereof the defendant, by its counsel, then and there duly excepted.

Forasmuch as the matters aforesaid do not appear of record defendant prays that the same may be signed, sealed, and
152 made a part of the record in this cause, and it is accordingly so done this 2nd day of September, A. D. 1898.

HORACE G. LUNT, *Judge.* [SEAL.]

Approved:
J. C. HELM,
COLBURN & DUDLEY,
Attorneys for Plaintiff.

Approved:
W. E. SO RELLE,
Attorney for Defendant.

O K.
COLBURN & DUDLEY AND
J. C. HELM.

Tendered to me this 15th day of July, A. D. 1898.

HORACE G. LUNT, *Judge.*

I, Edgar Howbert, clerk of the district court of the fourth judicial district of the State of Colorado, do hereby certify the above and foregoing to be the original bill of exceptions filed in the case of The Ajax Gold Mining Company *vs.* The Calhoun Gold Mining Company on the 2nd day of September, A. D. 1898.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Colorado Springs, this 14th day of September, A. D. 1898.

EDGAR HOWBERT, *Clerk,*
By E. C. DAVIS, *Deputy.*

Revenue stamp.

Endorsed: 4870. Filed in the district court of El Paso county, Colorado, Sep. 2, 1898. Edgar Howbert, clerk, by E. C. Davis, deputy.

153 In the Supreme Court of the State of Colorado.

THE AJAX GOLD MINING COMPANY, a Corporation, Appellee,
vs.
THE CALHOUN GOLD MINING COMPANY, a Corporation, Appellant.

Appeal from the District Court of El Paso County, Colorado.

Assignment of Errors.

Comes now the said appellant and shows unto the court that there was manifest error in the court below in this cause, and that the judgment of the court below should be reversed, and that judgment be entered in favor of appellant on account — the many and manifest errors apparent from the record herein, to wit:

1. The court erred in granting an injunction against the defendant, prohibiting defendant from prosecuting work in the Ithica tunnel or from extracting, removing, and selling ores from the veins intersected in said tunnel (folios 17–23).

2. The court erred in granting the injunction dated March 27, 1897 (fol. 18).

3. The court erred in denying defendant's petition to remove said cause to the circuit court of the United States within and for the district of Colorado (fol. 50).

4. The court erred in denying defendant's motion to dissolve the injunction issued against defendant March 27th, 1897 (fol. 148, 149).

5. The court erred in denying defendant's motion for leave to develop the veins described in the answer (fol. 153*a*).

154 6. The court erred in dissolving the injunction against the plaintiff (fol. 162).

7. The court erred in finding and entering final judgment in favor of the plaintiff or against the defendant for the reason that said judgment was not supported by the evidence and is contrary to law (fol. 170).

8. The court erred in said judgment in finding that the defendant is not entitled to a right of way through the Ithica tunnel through and across the Monarch, Mammoth Pearl, and Apex Lode mining claims (folio 170).

9. The court erred in said judgment in adjudging and decreeing that the plaintiff is the owner of and entitled to the sole, exclusive, peaceable, and undisturbed possession of the veins intersected in the Ithica tunnel, which said veins do not appear upon the surface and were not known to exist before the location of said tunnel (fol. 170).

10. The court erred in said judgment in adjudging and decreeing that the plaintiff is the owner and entitled to the sole and exclusive possession of the vein of the Victor Consolidated Lode mining claim within the side and end lines of the Apex, Monarch, and Mammoth Pearl Lode mining claims (folio 179).

11. The court erred in making the temporary injunction granted March 27th, 1897, against defendant perpetual and restraining defendant from further taking out the ores from the veins inter-

sected in said tunnel or from the Victor Consolidated vein, and also restraining defendant from exercising its right of way through plaintiff's claims in following said Victor Consolidated vein (fol. 181).

155 12. The court erred in said judgment in finding "that the matters and things stated in the complaint are true" (fol. 170).

13. The court erred in said judgment in finding that defendant constructed said tunnel without plaintiff's knowledge or consent (fol. 170).

14. The court erred in said judgment in finding that the veins, lodes, or ledges having their tops or apexes within the surface in conflict between the Victor Consolidated Lode claim of defendant and the Apex, Monarch, and Mammoth Pearl claims of the plaintiff were included in the grant and conveyed by the United States patents issued for the said Apex, Monarch, and Mammoth Pearl claim- (fol. 170).

15. The court erred in excluding the testimony offered by defendant tending to prove that no discovery of any vein, lode, ledge, or deposit bearing mineral in rock in place had been made within the Monarch or Mammoth Pearl Lode claims prior to the date of the location of the said Ithica Tunnel site (fol. 6, bill of exceptions).

To all of which errors the defendant then and there duly excepted.

Wherefore and for other good and sufficient reasons appearing in said record the appellant prays that the judgment herein be reversed, and that judgment be entered in favor of appellant or the cause remanded to the said district court of El Paso county for further proceedings herein.

W. E. SO RELLE,
Att'y for Appellant.

Endorsed: No. 3954. In supreme court, State of Colorado. The Calhoun Gold Mining Co., appellant, *vs.* The Ajax Gold Mining Co., appellee. Transcript of record, bill of exceptions, and assign-
156 ment of errors. Filed in supreme court this 14th day of Sept., 1898. Horace G. Clark, clerk.

In the Supreme Court of the State of Colorado, September Term, A. D. 1899.

THE CALHOUN GOLD MINING COMPANY, Appellant,
v.
THE AJAX GOLD MINING COMPANY, Appellee. } No. 3954.

District Court of El Paso County.

At this day, this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of El Paso as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings

and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said district court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said appeal.

157 It is further considered and adjudged by the court that said appellee do have and recover of and from said appellant costs in this behalf expended, to be taxed, and that it have execution therefor; and let the opinion of the court filed herein be recorded.

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 20th day of November, A. D. 1899, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, in the city of Denver, this 27th day of January, A. D. 1900.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK, *Clerk.*

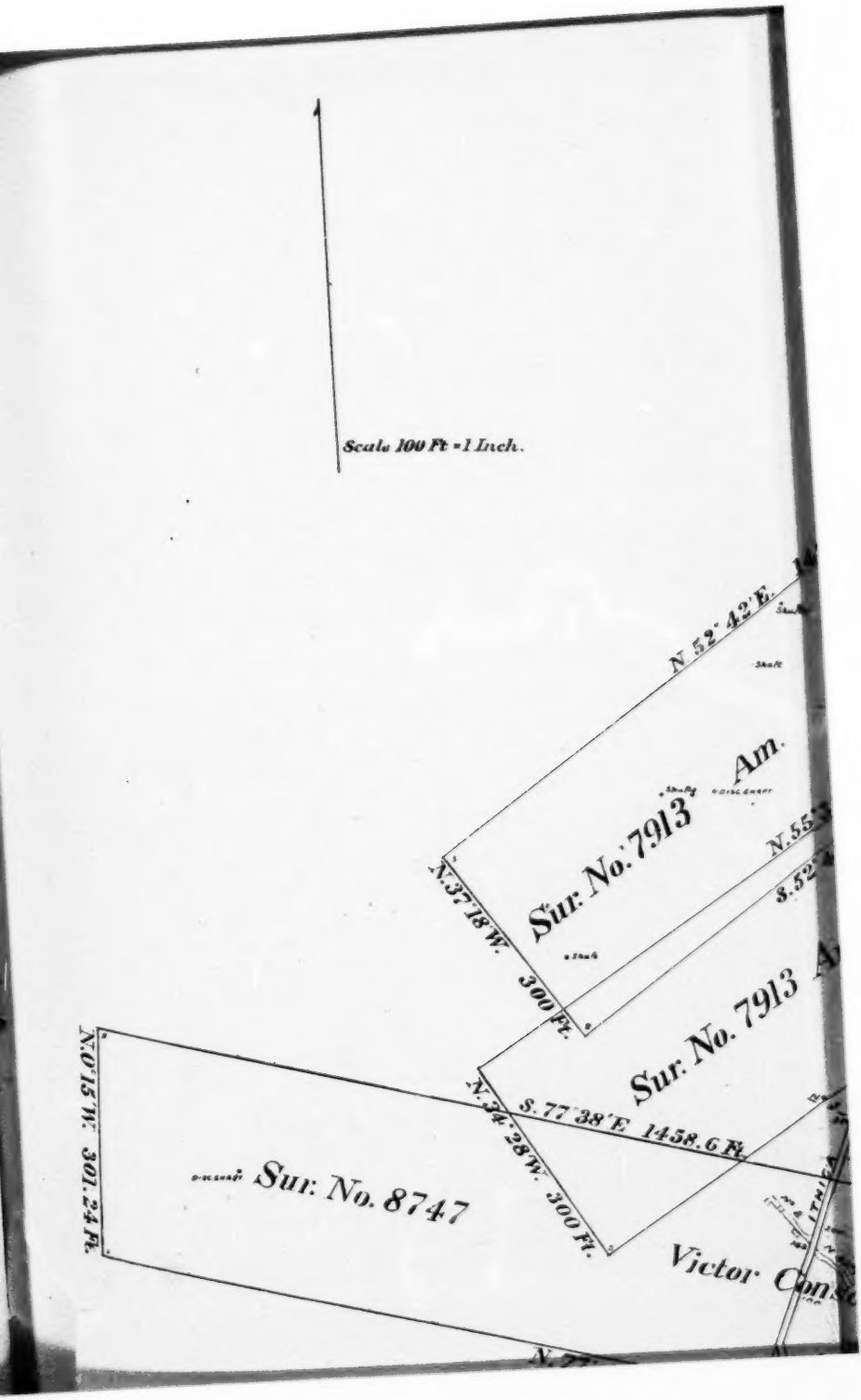
158 THE CALHOUN GOLD MINING COMPANY, Appellant,
v.
THE AJAX GOLD MINING COMPANY, Appellee. } No. 3954.

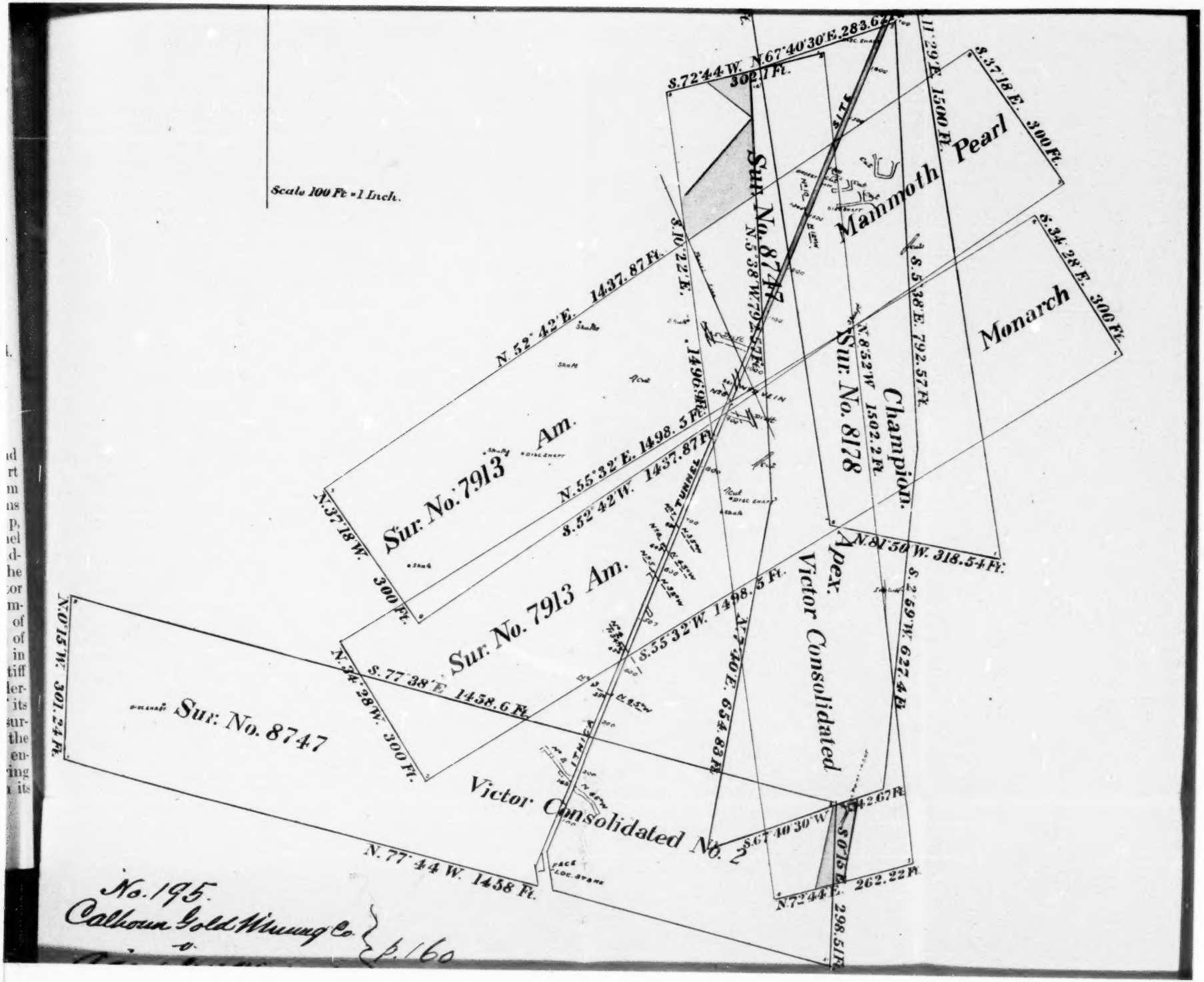
Appeal from the district court of El Paso county.

Mr. Justice GABBERT delivered the opinion of the court:

Appellee, the owner of the Monarch, Mammoth Pearl, Ajax, and Champion Lode mining claims, commenced this action in the court below to recover damages and restrain appellant, as defendant, from removing ore claimed to be within the boundaries of these claims and to which it asserted it was entitled by virtue of such ownership, and also to restrain defendant from prosecuting work upon a tunnel which the latter was excavating underneath such claims. Defendant answered, justifying its removal of ore and excavation of the tunnel upon two grounds: (1) That it was the owner of the Victor Consolidated claim, the vein of which crossed each of those embraced within the claims of plaintiff; (2) that it was the owner of the Ithica Tunnel site, projected across these claims, by virtue of which it was entitled to extend a tunnel underneath them; that in prosecuting work thereon it had penetrated the claims of plaintiff and discovered, located, and claimed numerous blind veins underneath the surface of such claims; that it had also cut the vein of its Victor Consolidated claim in this tunnel underneath the sur-

159 face of plaintiff's claims and removed ore therefrom of the value of four hundred dollars, and that it claimed to be entitled to excavate and run this tunnel for the purpose of discovering such blind veins, to work and remove ore therefrom and from its


Scale 100 Ft = 1 Inch.
N. 52° 42' E.
Sur. No. 7913 Am.
N. 37° 18' W. 300 Ft.
N. 55°
S. 52°
Sur. No. 7913 A
N. 34° 28' W. 300 Ft.
S. 77° 38' E. 1458.6 Ft.
N. 0° 15' W. 301.24 Ft.
Sur. No. 8747
Victor Con
N.



No. 195.
Calhoun Gold Mining Co. } p. 160

Victor Consolidated vein. By stipulation the Champion was dropped from the case. Upon the issues made by the pleadings, the facts thereby admitted, a stipulation as to those controverted, and certain documentary evidence, the cause was tried to the court, which resulted in a judgment adjudging plaintiff to be the owner in fee of each of its lode claims in controversy in their entirety as patented, and, *inter alia*, with respect to veins, "together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims, extended downwards vertically," for damages in the sum of four hundred dollars, and also enjoining defendant from prosecuting work upon or extending its tunnel underneath the claims of plaintiff, and with respect to removing ore, enjoined defendant (employing the language of the judgment) "from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within the side and end lines of plaintiff's said claims, extended downward vertically." From this judgment the defendant brings the cause here on appeal.

The following reproduction of the plat which the parties stipulated below was correct, showing the relative location of the respective properties over which this controversy arises, will materially aid in understanding the questions involved.

(Here follows plat marked page 160.)

161 The controversy over the right of appellant to extend its Ithica tunnel is from the point where it enters the Monarch on the southerly side and from thence across the claims of plaintiff. The blind leads discovered are in that portion of the tunnel between the point where it enters plaintiff's claims on the south and the breast of its excavation. The vein of the Victor Consolidated is also cut in this tunnel at point marked 961. The conflict in the lode claims of the respective parties is included in the territory bounded by the south side line of the Monarch, the north side line of the Mammoth Pearl, and the side lines of the Victor Consolidated between these two lines. We are relieved from stating the pleadings to any considerable extent or determining the questions of law thereby presented, because on the trial below it was stipulated that the following are involved:

"First. Whether or not the Ithica tunnel, in such pleadings described, is entitled to a right of way through plaintiff's lode claims.

Second. Whether or not defendant has acquired by virtue of said tunnel and tunnel-site location the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

Third. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries and across plaintiff's lode claims.

Fourth. Whether or not the defendant may in this cause intro-

duce evidence for the purpose of showing that there was no
162 discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff prior to the location of said tunnel site."

From the pleadings, evidence, and stipulation of the parties, the facts established, so far as material to the controverted questions of law involved, are that each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on each of the claims of appellee issued prior to the location of the tunnel site and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the Apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins in the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of four hundred dollars removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated
163 excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithica Tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithica Tunnel site, and blind veins discovered therein underneath the claims of appellee are vested in appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl Lode claims. The rights of the parties depend principally upon a construction of the following sections of the Revised Statutes of the United States:

"§ 2322. The locators of all mining claims heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United

States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,
164 and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

"§ 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnels shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

165 "§ 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The main questions presented for our determination, for convenience, we summarize as follows:

1. Is appellant the owner and entitled to the ore contained in the veins of the Victor Consolidated claim within the surface boundaries of appellee's lode claims?

2. Has appellant acquired, by virtue of its tunnel-site location, the ownership and right of possession to the blind veins cut therein underneath appellee's claims, and is its tunnel entitled to a right of way through the lode claims of appellee?

3. Should appellant have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of appellee prior to the location of the Ithica Tunnel site?

All these were answered in the negative by the court below.

The first question presented involves, particularly, a construction of § 2336 *supra*. The rights of a junior location to the ore of its vein embraced in the conflict with a senior have been determined by this court in Branagan *v.* Dulaney, 8 Colo., 408, and in several subsequent cases which have adopted the doctrine announced
166 in that case on this subject, and if we adhere to the law as announced in those cases, then the rights of appellant to the ore in the vein of the Victor Consolidated, included in the territory of that claim conflicting with that of appellee, are fixed and settled; for under these decisions it would be entitled to all this part of its vein except where it intersects the veins of appellee's claims. It is contended by counsel for appellee that the ruling in Branagan *v.* Dulaney and cases following it is wrong, and that this question should now be reconsidered. In opposition to a reconsideration of the rights of cross-lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and even if wrong should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this State. We are aware of the gravity of reversing a long-established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this Commonwealth have a right to presume that when a question has been once settled by this court that its decision is correct and that all may rely upon it. We understand, generally, that when a decision has established a settled rule of property upon which rights are predicated (and especially those relating to real estate) the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous—Black on Interpretation of Laws, § 152—but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong it should not be continued, unless it has been so long the rule
167 of action and relied upon to such an extent that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. Black on Interpretation of Laws, *supra;* Sutherland's Stat. Constr., § 316; Boon *v.* Bowers, 30 Miss., 246.

The law as announced in Branagan *v.* Dulaney has led to much confusion, and has been a fruitful source of litigation. Under it doubts have been cast upon titles to mining properties, and supposed rights reduced to uncertainties. Judging by the experience of the past, coupled with the knowledge of the present great activity in mining, to some extent caused, perhaps, by the marked improvements in mining and the reduction of ores, this industry is comparatively in its infancy in this State, and if the rule regarding cross-leads, as announced by this court, is wrong, it will result in more injury in the future to perpetuate it than will temporarily be caused by its reversal. It is a matter of common knowledge that ever since the decision of this court on that question its correctness has been doubted by many eminent members of the bar of this State familiar with mining law, and has even been the subject of expression to

that effect by this court—The Argonaut C. M. & M. Co. *v.* Turner, 23 Colo., 400—in which it was said, in speaking of the rights conveyed by patent to a mining claim, that it conveys all lodes or veins having their apexes within the boundaries of such claim, except, perhaps, cross-lodes. This doubt has been generally entertained by those engaged in mining, so that notwithstanding the length of time which has elapsed since the rendition of the first decision of this court on this question, it is safe to assume that it has not been implicitly relied upon as a sound exposition of the law relating
168 to cross-leads, and that in the great majority of instances parties have governed themselves accordingly.

The law construed in Branagan *v.* Dulaney is an act of Congress. The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort. The construction of an act of Congress cannot be said to be authoritatively settled until passed upon by the highest court authorized so to do. This is the Supreme Court of the United States. It has never decided the question regarding cross-veins as presented in the case at bar. The decision of this court on that question may be reviewed by that tribunal; so that although this court has given the statutes affecting cross-lodes a construction which has since been followed in this State, nevertheless, as these same statutes are still open to construction by the highest tribunal of the land, their meaning on the subject of cross-leads as involved in this case has not been finally determined so as to become *stare decisis*. In Arizona, California, and Montana a different construction regarding the rights of cross-lode claimants has been given from that announced by the supreme court of this State. Watervale M. Co. *v.* Leach, 33 Pac., 418; Wilhelm *v.* Silvester, 101 Cal., 358; Pardee *v.* Murray, 4 Mon., 234.

169 Whether or not the reasons given for this conclusion are sound is not material. Sooner or later this question must be determined by the Supreme Court of the United States, and when it is, the law thus settled must be followed by all the courts of the States and Territories in which the act in question is in force. For these reasons we conclude that although this court has passed upon the identical question regarding cross-veins now involved, it is not precluded from again considering it, under the doctrine of *stare decisis*, or that the law as announced by this court in previous cases has become a settled rule of property in this State; and if, upon a reconsideration of such question, we conclude that our previous decisions thereon were wrong, we should not wait for a superior tribunal to so declare.

Before proceeding, however, with a discussion of this question we suggest that were it not for the expression in The Argonaut C. M. &

M. Co. *v.* Turner, *supra*, the action of the trial court in refusing to follow Branagan *v.* Dulaney would certainly be subject to criticism.

Previous to the act of 1872 relating to mining claims, which, with a few modifications, has been in force ever since its passage, the rights of a locator were practically limited to the vein upon which his location was made. That was the thing granted; the rights to surface ground only attached for the purpose of the convenient working of the vein so located; no rights to any other vein except the one upon which the location was made were given. Under the law then in force the surface ground, with the vein located, varied, controlled, as it was, in a great measure, by local rules or, in
170 their absence, by the judgment of the Land Department in each particular case, as to the area necessary for the convenient working of the mine; so that, as might be expected, the patents issued under the law prior to the act of 1872 embrace surface areas different and irregular in form. By this latter act a marked change was effected. The surface area which could be controlled by one location was definitely fixed, and this area being extensive it was necessary that rights therein should be definitely declared. The rights of the locator to the mineral which might exist underneath such surface area was no longer limited to the one vein upon which he made his location. By § 2322, *supra*, it is expressly provided that from and after the passage of the act of which it forms a part the locators of all mining claims theretofore or subsequently made, to which no adverse rights had attached on the tenth day of May, 1872, upon compliance with the laws and regulations governing their title, shall have the exclusive right of possession and enjoyment of the surface included within the lines of such locations and of all veins throughout their entire depth apexing inside of such surface lines extended downward vertically, although such veins might so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines. This section, standing alone, would seem to be clear, explicit, and unambiguous. It provides a test by which the right of a locator to a vein inside of the lines of his location extended downward vertically should be determined, namely, if the top or apex of a lode was within the boundaries of his claim, as above designated, then he should be the exclusive owner thereof, provided, of course, that no adverse rights thereto existed at the date of his location.

171 It is claimed by counsel for appellant that this section, by implication, excepts cross-veins, because no extralateral rights are given such veins, such rights being measured by the end lines of the claim extended in their own direction, and as cross-veins would not intersect these lines no extralateral rights would attach to such veins. That question is not involved in this case. Appellant is making no claim to any portion of the veins in controversy by reason of extralateral rights; and, besides, the vein of the Victor Consolidated is given no such rights, because by the judgment appellee is only declared to be the owner of that portion of the vein within the boundaries of its claims extended downward vertically. The most that can be said for this section on account of its phrase-

ology is that cross-veins are not given extralateral rights; and yet we can conceive of a location where a cross-vein upon its strike may cross the one upon which the location is made and intersect both end lines; but granting, for the sake of the argument, that veins crossing the one upon which the location is made have no extralateral rights (but upon that question we express no opinion), this would only operate as a limitation as to such rights, and not as to others which would attach by virtue of a location, for naming limits of a grant is not equivalent to saying that nothing is granted which does not extend to those limits. Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S., 55. It is by virtue of § 2336, particularly, that counsel for appellant contend that the portion of the vein of the Victor Consolidated in controversy belongs to the latter, their position being that by this section cross-veins are excepted from the operation of § 2322. It is the section construed in Branagan
172 *v.* Dulaney. The rule adopted by the court in construing it in that case is an arbitrary one and never resorted to except in cases where the different sections of an act are in conflict, namely, "as between conflicting sections in the same statute, the last in order of arrangement will control," and applying this doctrine reached the conclusion that under § 2322 the locator of a claim acquired no rights to cross-veins apexing within the limits of his location.

The rule above announced is only applicable when there is an irreconcilable conflict between the different sections of the same act, and no reasonable construction will harmonize the parts; but as the two sections under consideration do not conflict in all their terms, the real question presented in construing them is, Does the latter qualify the former? It is presumed that each section is intended to coact with every other of the act of which it is a part, and that no one is intended to antagonize the general purpose of the enactment. Sutherland's Stat. Const., § 160. It is also a rule that in order to ascertain the legislative intent, every section of an act is to be construed; that it is to be construed as a whole—*supra;* Parkinson *v.* State, 74 Am. Dec., 522—and that construction which renders the whole act harmonious and gives effect to every clause and part is to be favored. 23 Enc. Law, 309; Brooks *v.* Mobile School Comms., 31 Ala., 227; People *v.* Burns, 5 Mich., 114; Patterson *v.* Spearman, 37 Iowa, 36.

In Branagan *v.* Dulaney it was assumed that the "space of intersection" meant the intersection of the veins of conflicting cross-locations, and as the mineral in this space was given to the prior location and none other, that, therefore, the junior locator of a cross-
173 lead had all the ore in his vein within the space of intersection of the conflicting locations save at the space where the veins intersected. § 2336 does not purport to provide for the location of cross-veins over territory included within a prior valid and subsisting location. Its purpose appears to be to fix the rights of the claimants of such veins to settle what might otherwise be conflicting rights between claimants of veins crossing or intersecting each other and provide easements for the benefit of the claimants of such veins—Wilhelm *v.* Silvester, *supra*—and unless in making such

provisions it impliedly gives the junior cross-claimant the ore of his vein, except at the point where it intersects the vein of a senior location, the doctrine announced in Branagan *v.* Dulaney cannot be upheld, so that in order to determine what rights are conferred upon a junior cross-claimant under this section the real question is, What is meant by the "space of intersection"?

The words employed in a statute are to be construed with reference to its subject-matter and the objects sought to be attained—23 Enc. Law, 322; Brewer's Lessee *v.* Blougher, 14 Peters, 178; Sedgwick's Stat. Constr., 359—as well as the legislative purpose in enacting it, and its language should receive that construction which will render it harmonious with that purpose rather than that which will defeat it. *Ibid.*, 319; Taylor *v.* Board of Comm., 67 Ind., 383; People *v.* Lacombe, 99 N. Y., 43. When ambiguous, its general intent as gathered from the statute furnishes a key by which its ambiguities may be solved and thus its words given that meaning which will harmonize with that intent. Sutherland's Stat. Constr., §§ 218, 219. Conditions with reference to the subject-matter
174 of the act, which it is apparent from its context it was necessary to provide for, may also be considered in ascertaining what is meant by that which is apparently ambiguous. People *v.* Lacombe, *supra.* It is evident from the provisions of § 2322 that the intent of Congress was to give to the locator of a claim to which no adverse rights had attached every vein apexing within the surface boundaries of his location unless its intent is negatived by § 2336. The words "intersect" and "cross" as used in this section are not strictly synonymous, and in using both it must be presumed intended to provide for different conditions. Veins might intersect, either on their strike or dip, and not cross; in that event it was necessary to provide which location should have the ore at the space of intersection, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior location should have the right of way through the space of intersection for the convenient working of his mine. From a casual reading of this section it might be inferred that the "space of intersection" meant the intersection of the veins, but that does not necessarily follow, when its meaning, as ascertained by one or more of the canons of construction which may be invoked, is ambiguous, or different conditions exist which would control its import, or if by giving it that limitation the section in which it occurs conflicts with other portions of the act. Previous to May 10, 1872, as before noticed, no rights attached to any vein except the one upon which the location was made. All rights which had attached pre-
vious to that date were in no manner disturbed. § 2322, *supra,*
175 and 2344, *ibid.* In case of conflicting cross-locations made prior to that date each locator would hold the vein located upon up to the point where they intersected on their strike. It was necessary to settle which should have the ore within the space of intersection of such veins, and if they crossed what further rights the junior locator should have. This was done. In such case inter-

section would clearly mean the intersection of the veins. In case of locations made under the act of 1872 or prior to that date which were substantially parallel the respective veins in each might either intersect or cross upon their dip, in which event it would be necessary to provide which should be entitled to the ore within the space of vein intersection; and here, again, the meaning of "space of intersection," or the subject to which it refers, is the intersection of the veins. Again, under the conditions last noticed, the veins might unite, and to provide for this contingency it was declared that the prior location should take the vein below the point of union, including all the "space of intersection," which in that instance also refers to the intersection of the veins.

It may be urged that the construction thus far of this section is in conflict with § 2322 for the reason that under the latter the ownership of the space of intersection would depend upon which vein filled that space. Granted that this may be true, then we must invoke the rule that an act must be construed as a whole, and if the construction of § 2336 so far given modifies § 2322 it is not violating any rule applicable to the construction of different sections of the same act, which apparently conflict. This construction, however, does
176 not cause any conflict between the two sections. The former gives to the locator the veins to which his rights attach throughout their entire depth, and if upon their strike, limiting the latter to rights which vested prior to the tenth day of May, 1872, or in descending into the earth a body of ore bounded by the foot and hanging walls of his veins extended in their general course has been intruded from another source, or if in descending they unite with other veins, these are not reasons why he should not be the owner of such spaces of intersection or enlargements of his veins, caused by intersecting or uniting with others, but on the contrary, according to the terms of § 2322, he should be, provided, of course, that his title is prior to that of the location of the veins intersecting or uniting with his; so that the construction of these sections, under the conditions noted, render them harmonious, and § 2336 simply recognizes that in conflicts in such cases priority of title should govern—a test which is clearly in harmony with § 2322, and limits the provisions of § 2336 thus far to easements only.

It may also be said that an easement would exist in favor of a junior claimant to follow his vein through the space of intersection caused by veins crossing upon their dip, because by § 2322 the locator is entitled to follow a vein in its course into the earth outside the vertical side lines of his location. This may be true, but as to veins crossing on their strike no such right is impliedly given by that section, and, as we have endeavored to demonstrate, such a right was necessary under conditions above noted. In case of locations made subsequent to the act of 1872 which cross each other, or
177 those made under that act which likewise conflicted with locations made prior to the date it took effect, it was also necessary to provide for possible conditions, namely, the respective rights of the claimants of such locations, within the conflict of their claims, and particularly for a right of way for the junior claimant;

and the vital question now to determine is what is meant by the space of intersection in such cases as employed in § 2336, and which party would own the ore of the vein of the junior location within that space. We again reiterate that the clear intent of § 2322 was to give the locator of a claim to which no adverse rights were in existence at the date of his location all veins apexing within its surface boundaries. That eminent jurist, Mr. Justice Brewer, with his extended experience in mining litigation, certainly spoke advisedly, in Del Monte M. Co. *v.* Last Chance M. Co., *supra* (although the precise question now being considered was not there presented), when he said, in speaking of the rights of a locator under the provisions of this section: "Every vein whose apex is within the vertical limits of his surface lines passed to him by virtue of his location. He is not limited to only those which extend from one end line to another or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines." To the same effect is the language employed in 101 Cal., *supra*. By that section he has been given title to all such veins. Such being the case, was it intended by § 2336 to modify that grant or vest title in a cross-claimant to any part of a vein apexing within the boundaries of a prior valid location, and, especially, what rights were intended to be granted or fixed under the conditions now being considered?

178 It provides that in such cases priority of title shall be the test by which the ownership of the ore at the space of intersection shall be determined. That is in accord with the rights conferred by § 2322. So stating, however, is not equivalent to a grant. That language does not import that an exception is carved out of an estate which has already passed. Under the facts now in mind the senior locator, by virtue of § 2322, would own the ore of the junior cross-vein within the boundaries of his location, and before that right could be divested under § 2336 it must appear from the wording of the latter that such right is thereby expressly excepted. That the language of this section is not susceptible of the construction that creates such an exception it seems to us is clear, when we bear in mind that which we have already stated, that it does not pretend to deal with the location of cross-veins over senior valid locations, but the purpose of which was to provide for easements and settle rights which otherwise might be doubtful or the subject of controversy, without some further declarations than those contained in § 2322; and so we conclude that to render the two sections harmonious the space of intersection as used in § 2336, when applied to the facts now being considered, means the intersection of the claims. Barringer & Adams, 472, 473.

Under § 2322 no rights were given the owner of a location crossing a prior one to invade the latter for any purpose in following his vein upon its strike. This was an important matter. Without such right a portion of his claim might be rendered valueless, but if the expression "space of intersection" is limited to the intersec-

179 tion of veins as the space through which he should have a right of way for the convenient working of his mine it would

be of no avail, for he would have no right under which he could reach that easement; and so, again, in order to recognize one which would be of any value to the junior cross-claimant, the space of intersection must also mean the intersection of the claims. Morrison's Mining Rights, 9th ed., 115. The learned author of the work just cited, in treating the subject of title to ore included in the space of intersection as between conflicting cross-locations, under § 2336, gives the following cogent reasons why, in his opinion, as between such locations, the owner of the junior has a right of way through the senior, but no right to the ore of the claim which he crosses:

"It was within the power of Congress, by a subsequent clause, to have made the crossing lode an exception carved out of the general grant of the words of the previous section; but has it attempted so to do? The only grant of § 2336 is the right of way, which of itself implies that it is not a grant of the vein, but of an easement, to which the estate of the prior location is made servient."

"To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it, under act of Congress, would require in the wording of the act expressions as strong as are required to create an exception in a deed. An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation, which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator, but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant of reaching the other end of his claim by passage through the senior location."

Under the conclusion reached in Arizona, California, and Montana in the cases above cited, the ore within the space of overlapping claims would belong to the owner of the senior location. In the Arizona case that conclusion was reached upon the ground
180 that the expression "space of intersection" meant intersection of the veins; that they might so intersect upon either their strike or dip, but as to the former it was limited to locations made prior to the tenth day of May, 1872. The learned judge who wrote the opinion in that case appears to have given it careful consideration, but in seeking to harmonize the two sections, it seems to us, fell into the error of (1) holding that the space of intersection meant intersection of veins only; (2) imposed a limit upon the provisions of the section when he announced that it only applied to the intersection of veins upon their strike under locations made prior to May 10, 1872, which is not warranted, either expressly or by implication, and (3) by so doing necessarily deprived a junior location made under the act of 1872 of the right of way across a senior location if the former crossed the latter. In the California case the eminent jurist who wrote the opinion seems to have entertained similar views regarding the application of this section to rights which vested prior to May 10th, 1872, but, except as to those rights, inclined to the conclusion that this section only referred to the intersection of veins

upon their dip, which would also result in depriving a junior cross-claimant of a most important right. We think that Chief Justice Beatty, who concurred in the opinion in that case, more nearly announced the true doctrine when he said:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of § 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins
181 which intersect upon their strike without bringing it in conflict with the plain terms of § 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the State courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The opinion in the Montana case is not altogether clear, but seems to limit the space of intersection as applied to the facts there presented to the intersection of the conflicting claims, but does not enter into a discussion of the subject, so that although we agree with the conclusion reached in each of those cases, we cannot accept the limitations imposed upon the provisions of this section or endorse the reasons advanced by the learned writers of the opinions in the Arizona and California cases.

Our conclusion is that the provisions of § 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and in so far as § 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of § 2322..

182 As we understand the rulings of the Land Department in issuing patent for conflicting mining claims, there is always excepted from the surface of the junior that portion conflicting with the senior, as well as all veins apexing within such conflict. This practice is in accord with our views, and although such a construction would not be controlling, the interpretation put upon the act by those whose duty it has been to construe, execute, and apply it is entitled to much weight. 23 Enc. Law, 339; Frost *v.* Pfeiffer, 26 Colo., ——; 58 Pac., 147; People *v.* Le Fevre, 21 Colo., 218.

The receiver's receipt, as well as the patent issued appellant, excepted therefrom all veins apexing within the conflict between its claim, the Victor Consolidated, and those of appellee. The patents to the latter granted all such veins, and thus all rights attaching by virtue of priority of location have been preserved to appellee. The location of the Victor Consolidated was junior to that of the claims

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of appellee, and from this fact and the views expressed it follows that appellant cannot complain of the judgment of the lower court in so far as it awards to appellee the vein of the Victor Consolidated and all veins apexing within the boundaries of the claims of the latter and awarded damages for the removal of ore. These views are in conflict with the case of Branagan *v.* Dulaney, and that case, as also those of this court following it, in so far as they conflict with the doctrine now announced regarding conflicting cross-claims, are overruled. The language of the judgment of the lower court regarding the rights of appellant in the conflicting territory is very explicit,
but only extends to acts of trespass, and does not prohibit those
183 which it may exercise therein by virtue of its ownership of the Victor Consolidated claim.

The determination of the second question presented involves a construction of § 2323, *supra*. The contention of counsel for appellant is that in all patents for lode claims blind leads are excepted and that the patentee takes no title thereto by virtue of patent. In answer to this, we have only to advance one step further in the construction of § 2322 and call attention to the fact that the test there applied by which the ownership of veins embraced in a valid, subsisting location is determined is that they apex within the boundaries of his claim extended downward vertically, without regard to where such apexes may be with reference to the surface, so that again the question presented is, does § 2323 conflict with or in any manner modify the provisions of § 2322, and in construing them the same rules must be observed relative to the construction of an act containing different sections that have already been invoked. The former provides what rights may be acquired to blind veins discovered in a tunnel run for the development of the vein or for the discovery of mines, but upon what ground may such tunnel be run or within what territory must the blind leads discovered therein be located in order to give the discoverer any rights thereto? A valid location of a mining claim, so long as it is in full force and effect, operates as a bar to a second of the premises so claimed. Belk *v.* Meagher, 104 U. S., 279; Gwillam *v.* Donnellan, 115 U. S., 45; Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S., 55. The only exception is that a given location leaves open to others such rights therein as do not attach by virtue of such location; in other
words, that a location only carries with it such rights as it is
184 entitled to under the law by virtue of which it is made, and that rights not attaching are reserved to others. It is upon this ground that appellant contends that its rights to the blind leads in question attach—that is, that under § 2323 these veins are impliedly excepted from the locations and patents of appellee's claims. If such a conclusion can be deduced from the sections under consideration, they are hopelessly in conflict, for, first, there is granted all veins the ownership of which is determined in the manner we have designated, including blind, and then, immediately following, the grant to the latter is withdrawn. A location can take no rights which conflict with a prior valid one so long as it is kept alive. The law contemplates and the authorities recognize that the very

life of a mineral location depends upon the fact that it is made upon unappropriated mineral domain, and, with the one exception already noticed, this requirement extends to the entire location—that is, it cannot embrace any ground, nor can it initiate any rights, within the boundaries of a prior valid, subsisting location, except those reserved from the latter. This rule extends to all classes of mineral locations. In other words, priority determines the rights between conflicting locations. The tunnel of appellant was commenced upon ground open to location, but at the time it was located and work thereon commenced the ground embraced within the claims of appellee had already been located and claimed as lode claims, so that the rights of appellee to the ground within the boundaries of its claims and the leads in question had attached before appellant attempted to initiate any title thereto, and therefore none attached by virtue of the location of or work upon its
185 tunnel site, unless it appears that by virtue of § 2323 a tunnel for the discovery of blind leads may be projected across and extended into prior valid, subsisting locations, and title to the blind leads discovered within the boundaries of such claims thus be secured. It provides how inchoate rights to blind veins may be initiated; how they may become absolute; but nowhere does it in terms, either expressedly or impliedly, declare that for these purposes it may be projected into or across prior valid locations. To give it the interpretation that it does is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the section preceding, and overthrows the doctrine of priority—the foundation upon which mining rights rest. It does not provide that under a location for tunnel-site purposes a right is granted to search for minerals in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain, while limiting it to locations for tunnel-site purposes to ground not previously appropriated renders it harmonious with § 2322. That the latter was the clear meaning and intent of Congress in passing the act, of which these two sections form a part, is apparent from the further reading of § 2323, which in terms provides that locations on the line of the tunnel contemplated by this section of veins not appearing on the surface, made by others after the commencement of work thereon, and while it is being prosecuted with reasonable diligence, shall be invalid—a clear recognition of the controlling principle of priority. Counsel for appellant assert that the Enterprise M. Co. *v.* Rico-Aspen M. Co., 167 U. S., 108, and Ellet *v.* Campbell, 18 Colo., 510, affirmed in 167 U. S., 116, are authority for
186 their proposition that blind leads are excepted from all locations and patents; that no rights to such leads attach until discovered; that a tunnel site may be projected across and its tunnel extended underneath previous valid subsisting locations, and title to blind leads discovered in such tunnel within the boundaries of such claims not known to exist previous to the commencement of work thereon may be thus acquired by the owner of such tunnel. Neither of such cases so hold, and while they cannot be said to be directly in point, because the facts in the case at bar and those are

entirely different, yet by analogy the principle upon which the right to blind leads discovered and located under the section of the statute relative to tunnel sites which was applied in those cases is the same as that upon which we base our decision here, viz., priority of location; for in each of those cases the tunnel site was located prior to the date of the location of the lode claims within territory embraced within the tunnel-site location, and within the boundaries of which the blind leads were discovered and located, which were the subject of controversy. It was upon this ground, as we read and understand the opinions in these cases, in connection with the facts, that the inchoate rights of the tunnel claimants to such leads were predicated, and by virtue of which, when discovered on the line of the tunnel, they became absolute.

On the subject under considera-ion one further question needs to be determined, namely, Has appellant a right of way for its tunnel through the territory of appellee? It is contended by counsel for appellant that, under § 2338 Rev. Stat. U. S. and § 3141 Mills,
187 it is entitled to such rights. The first of these sections provides that in the absence of necessary legislation by Congress the legislature of a State may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills referred to provides that a tunnel claim located in accordance with its provisions shall have the right of way through lodes which may lie in its course, but it will be observed that this section only refers to tunnels located for the purpose of discovery, and if any of its provisions are still in force, which appears to be doubted in Ellet *v.* Campbell, *supra*, they can have no application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines, and the section of Mills relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of Congress, so that if appellant is entitled to the right claimed it must attach by virtue of some provision of this act.

Mining rights are statutory, but not purely so. They relate to real estate, and such rights as are not defined or limited by statute are still controlled by the rules of the common law. Such rights as are conferred by a valid prior location, so long as it remains in full force and effect, are preserved from invasion and cannot be infringed upon or impaired by subsequent locations—Lindley on Mines, § 363—and are as fully protected under the rules of the common law as any
other classes of real estate. Under the statutes the subse-
188 quent locator has no right to penetrate a senior valid subsisting location underneath its surface boundaries extended downward vertically, except for the purposes specified in the mining law. We will not undertake to specify what these exceptions may be, but so far as they are not fixed by statute the possession and enjoyment of the ground underneath the surface of a valid subsisting location cannot be invaded. These exceptions do not include a

right to drive a tunnel through such a location for the purposes of discovery.

We are not aware that the precise questions presented for our determination, which we have designated as proposition second, in the former part of this opinion, have ever been passed upon by an appellate court. In the case of Strattan *v.* Gold Sovereign M. & T. Co., reported in 1 Mills' Legal Adviser, 350, in which case complainant brought an action to restrain defendants from extending a tunnel through the claim of the former, which had been located prior to the date of the tunnel site, the defendants answered that they were driving such tunnel for the avowed purpose of discovering and claiming blind veins within the territory of complainant's claims. Complainant applied to Judge Hallett for a temporary injunction, which he granted, and in the course of his opinion said:

"Chapter 6 of the Revised Statutes provides for three kinds of locations on the public mineral lands, which, in common speech, are called 'lode locations,' 'tunnel locations,' and 'placer locations.' When a location has been properly made in either class and so long as it shall be fully maintained by use and enjoyment or by patent, the territory embraced in such location is not subject to ad-
189 verse location by a claimant of the same class, or any other class. The reason is that the territory covered by such location has been severed from the public domain and has become private property, which is no longer open to a new appropriation."

Our construction of § 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend a tunnel through previous valid, subsisting locations. From the record before us, appellant had no right to invade the premises of appellee, through its tunnel, and in the absence of any proof to the contrary the presumption attaches that all veins discovered in that part of its tunnel under appellee's claims belong to the latter—Wakeman *v.* Norton, 24 Colo., 192—and the judgment of the court that appellee was the owner of these veins and enjoining appellant from further extending its tunnel into or using that portion of it under the claims of appellee is correct.

The final question passed upon by the trial court, under the stipulation, relates to the offer of appellant to prove that at the time of the location of its Ithica Tunnel site no ore had been discovered in the Monarch and Mammoth Pearl. This offer was denied. At the time the tunnel site was located and work commenced thereon receiver's receipts had been obtained for these claims, upon which patents subsequently issued. These evidences of title took effect by relation as of date of the location of the respective claims. Lindley, § 783. As against a collateral attack, the action of the Land Department in issuing such patents conclusively settled that all steps necessary to constitute a valid location of these mining claims had
190 been taken, which included the discovery of mineral. This question has been so frequently decided that we do not deem it necessary to discuss it. Lindley, § 777; Davis, adm'r, *v.* Weibold, *supra;* Poire *v.* Wells, 6 Colo., 406; Justice M. Co. *v.* Lee, 21 Colo.,

260; Smelting Co. *v.* Kemp, 104 U. S., 636; Steele *v.* Smelting Co., 106 U. S., 447.

It is contended on behalf of appellant that this principle is not applicable as between tunnel-site and lode locations, because its rights were not involved in the patent proceedings. As to inchoate rights which attach to a tunnel location, this may be true, but it had none, unless it successfully attacked the title of appellee in apt time, for the location of appellee's claims was prior to the location of the tunnel site. At the time of that location receiver's receipt had issued upon the Mammouth Pearl and Monarch. We cannot understand how, upon any possible theory, the rule announced is not applicable, as between a tunnel-site location over a prior lode location, upon which a patent has already issued. So long as the title to the claims of appellee was only evidenced by receiver's receipt, it was still subject to an attack in a way; but when patent finally issued upon these claims, it conclusively settled, as against the junior location of appellant's tunnel site, that all steps necessary to constitute a valid location of appellee's claims had been taken.

Errors are assigned upon the action of the court below in denying appellant's petition to remove the cause to the circuit court of the United States for the district of Colorado. No argument is made upon this assignment, and we therefore decline to consider or pass upon it.

191 A further error assigned and argued by appellant is that the court erred in overruling its motion for leave to develop the blind veins in its tunnel within the lines of appellee's claims for the purpose of establishing their character. Its acts in attempting to initiate title to these veins was a trespass which it was not entitled to continue under any leave of court.

This disposes of all the questions argued, and, finding no error in the record, the judgment of the district court is affirmed.

Affirmed.

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original opinion of the supreme court of the State of Colorado filed in the above-entitled cause on the 20th day of November, A. D. 1899, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, in the city of Denver, this 27th day of January, A. D. 1900.

[Seal Supreme Court, State of Colorado]

HORACE G. CLARK, *Clerk.*

192 In the Supreme Court of the State of Colorado.

THE CALHOUN GOLD MINING COMPANY, Appellant,
vs.
THE AJAX GOLD MINING COMPANY, Appellee. } Certificate.

To the honorable the judges of the Supreme Court of the United States, Greeting:

This is to certify that in the above-entitled cause judgment was rendered against the above-named appellant, The Calhoun Gold Mining Company, on the twentieth day of November, A. D. 1899, and in the hearing and determination of said cause there were involved several Federal questions, and that the said The Calhoun Gold Mining Company claimed the following title, right, privilege, and immunity under the statutes of the United States, and that said decision was against said title, right, privilege, and immunity specially set up and claimed by the said The Calhoun Gold Mining Company, to wit:

1. That said appellant claimed to be the owner of and entitled to the ores contained in the veins of its Victor Consolidated claim within the surface boundaries of appellee's lode claims, to wit, the Monarch, Mammoth Pearl, and Apex claims, under § 2336 of the Revised Statutes of the United States, and the decision was against such title and right claimed by the appellant.

2. That the appellant, by virtue of the Ithica Tunnel site location, and under § 2323 of the Revised Statutes of the United States, claimed the ownership and right of possession to the blind
193 veins cut in such tunnel underneath appellee's claims, to wit, the Monarch, Mammoth Pearl, and Apex claims, and the decision of the said supreme court of Colorado was against such right and title claimed by appellant.

3. That appellee, under said § 2323 of the Revised Statutes of the United States, claimed a right of way for its said tunnel through said lode claims of appellee, and the said decision was against such claim of right by the appellant.

4. That the said appellant, under the Revised Statutes of the United States, claimed the right and privilege to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the said Monarch and Mammoth Pearl claims of appellee prior to the location of the said Ithica Tunnel site of appellant, and that said right and privilege was denied the said appellant under the said decision of the said supreme court of Colorado.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, on this twenty-seventh day of January, in the year of our Lord nineteen hundred, and of the Independence of the United States the one hundred and twenty-fourth, at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

194 *Certificate to Transcript of Record.*

UNITED STATES OF AMERICA, }
District of Colorado, State of Colorado, } ss:

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, in the United States of America, do hereby certify that the foregoing pages, numbered in folios from 1 to 520, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Calhoun Gold Mining Company, appellant, *v.* The Ajax Gold Mining Company, appellee, No. 3954, as the same remain of record on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Denver, in the district and State of Colorado, this twenty-seventh day of January, in the year of our Lord nineteen hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Seal Supreme Court, State of Colorado.

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado.

Endorsed on cover: File No., 17,628. Colorado supreme court. Term No., 195. The Calhoun Gold Mining Company, plaintiff in error, *vs.* The Ajax Gold Mining Company. Filed February 1st, 1900.

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No. 195.

Filed Mar. 5, 1901.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Office Supreme Court
FILED
MAR 5 1901
JAMES H. McKENNEY,
Clerk

OCTOBER TERM, 1900.

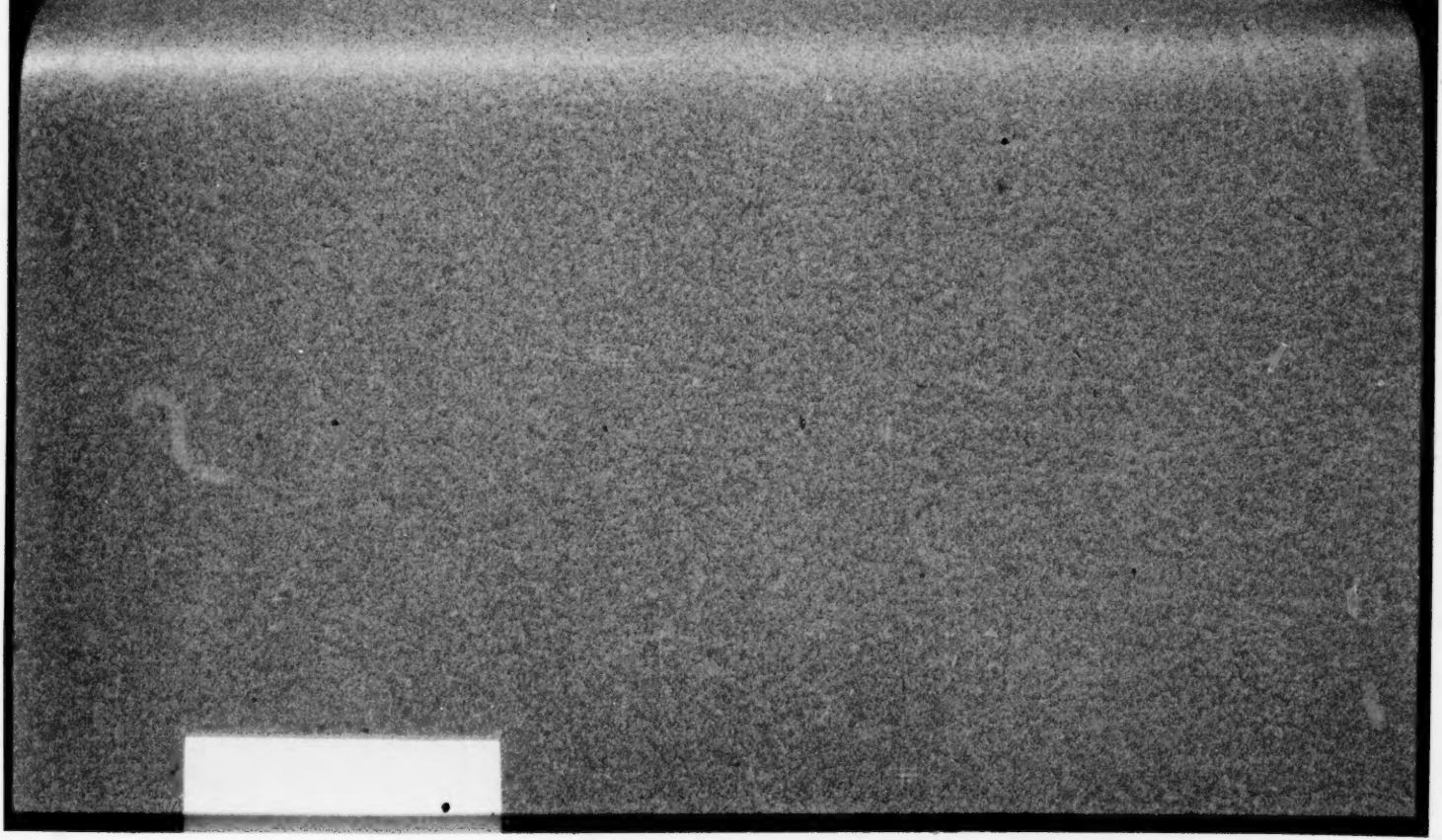
THE CALHOUN GOLD MINING COMPANY,
Plaintiff in Error.
vs.
THE AJAX GOLD MINING COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Colorado.

BRIEF OF PLAINTIFF IN ERROR.

W. E. SO RELLE,
Attorney for Plaintiff in error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

THE CALHOUN GOLD MINING COMPANY, *Plaintiff in Error.* vs. THE AJAX GOLD MINING COMPANY, *Defendant in Error.*	**No. 195.** *In Error to the Supreme Court of the State of Colorado.*

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error, The Calhoun Gold Mining Company, was appellant, and The Ajax Gold Mining Company, defendant in error, was appellee, in the Supreme Court of the State of Colorado.

Mr. Justice Gabbert, who delivered the opinion for

the Supreme Court of Colorado, makes a very clear statement of the facts material to the issues involved as follows, to-wit:

> "Appellee, owner of the Monarch, Mammoth Pearl, Apex and Champion Lode mining claims, commenced this action in the court below to recover damages and restrain appellant as defendant, from removing ore claimed to be within the boundaries of these claims and to which it asserted it was entitled by virtue of such ownership, and also to restrain defendant from prosecuting work upon a tunnel which the latter was excavating underneath such claims. Defendant answered justifying its removal of ore and excavation of the tunnel upon two grounds: (1) That it was the owner of the Victor Consolidated claim, the vein of which crossed each of those embraced within the claims of plaintiff, (2) that it was the owner of the Ithica tunnel site, projected across these claims, by virtue of which it was entitled to extend a tunnel underneath them; that in prosecuting work thereon it had penetrated the claims of plaintiff and discovered, located, and claimed numerous blind veins underneath the surface of such claims; that it had also cut the vein of its Victor Consolidated claim in its tunnel underneath the surface of plaintiff's claims and removed ore therefrom of the value of four hundred dollars and that it claimed to be entitled to excavate and run this tunnel for the purpose of discovering such blind veins,to work and remove ore therefrom and from its Victor Consolidated vein. By stipulation the Champion was dropped from the case. Upon the

issues made by the pleadings, the facts thereby admitted, a stipulation as to those controverted, and certain documentary evidence, the case was tried to the court, which resulted in a judgment adjudging plaintiff to be the owner in fee of each of its lode claims in controversy in their entirety as patented, and, *inter alia*, with respect to veins, 'together with all veins, lodes, or ledges having their tops or apexes therein, and including all that portion of the said Victor Consolidated vein within the side and end lines of the plaintiff's said claims, extended downwards vertically,' for damages in the sum of four hundred dollars, and also enjoining defendant from prosecuting work upon or extending its tunnel underneath the claims of plaintiff, and with respect to removing ore, enjoined defendant (employing the language of the judgment), 'from further taking out, extracting, or removing ore by means of said tunnel or otherwise from within the side and end lines of plaintiff's said claims, extended downward vertically.' "

From this judgment the defendant brings the cause here on appeal.

The following reproduction of the plat which the parties stipulated below was correct, showing the relative location of the respective properties over which this controversy arises, will materially aid in understanding the question involved.

(Here follows plat marked page 160.)

The controversy over the right of the appellant to extend its Ithica tunnel is from the point where it enters the Monarch on the southerly side and from thence across the claims of plaintiff. The blind leads discovered are in

that portion of the tunnel between the point where it enters plaintiff's claims on the south and the breast of its excavation. The vein of the Victor Consolidated is also cut in this tunnel at point marked 961. The conflict in the lode claims of the respective parties is included in the territory bounded by the south end line of the Apex, the north side line of the Mammoth Pearl, and the side lines of the Victor Consolidated between these two lines. We are relieved from stating the pleadings to any considerable extent or determining the questions of law thereby presented, because on the trial below it was stipulated that the following are involved:

First. Whether or not the Ithica tunnel, in such pleadings described, is entitled to a right of way through plaintiff's lode claims.

Second. Whether or not defendant has acquired by virtue of said tunnel-site location the ownership and right to the possession of the blind veins cut therein, to-wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

Third. Whether or not defendant is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim, within the surface boundaries and across plaintiff's lode claims.

Fourth. Whether or not defendant may in this cause introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of plaintiff prior to the location of said tunnel site.

From the pleadings, evidence, and stipulation of the parties, the facts established, so far as material to the controverted questions of law involved, are that each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on

each of the claims of appellee issued prior to the location of the tunnel site and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the Apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins of the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of four hundred dollars removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithica Tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithica Tunnel site, the blind veins discovered

therein underneath the claims of appellee are vested in the appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl Lode claims.

ASSIGNMENT OF ERRORS.

The errors assigned upon which the plaintiff in error relies are as follows:

First. The court erred in deciding that plaintiff in error is not entitled to the right of possession of the vein of its Victor Consolidated Lode mining claim through and across the Monarch, Mammoth Pearl and Apex Lode mining claims under section 2336 of the Revised Statutes of the United States.

Second. The court erred in denying to the plaintiff in error the right of way for its Ithica tunnel, located under section 2323 of the Revised Statutes of the United States, through and across the Monarch, Mammoth Pearl and Apex claims of defendant in error.

Third. The court errer in denying to the plaintiff in error, as the owner of the Ithica Tunnel site and mining claim, located under and by virtue of section 2323 of the Revised Statutes of the United States, the right of possession of all veins or lodes within three thousand (3,000) feet from the face of said tunnel on the line thereof, not previously known to exist, discovered in such tunnel, within the exterior boundaries of the said Monarch, Mammoth Pearl and Apex Lode mining claims.

Fourth. The court erred in denying to the plaintiff in error, as the owner of the Ithica Tunnel site and mining claim, located under section 2323 of the Revised Statutes of the United States, the right to prove that there was no discovery of any vein or lode within the

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limits of the claim located by appellee, to-wit: the Monarch and Mammoth Pearl claims, prior to the location and commencement of the said Ithica tunnel by the plaintiff in error and its grantors.

ARGUMENT.

The rights of the parties depend principally upon a construction of the following sections of the Revised Statutes of the United States:

> "§2322. The locators of all mining claims heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through

the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

"§2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnels shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

"§2336. Where two or more veins intersect and cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The main questions presented for determination we summarize as follows:

1. Is the plaintiff in error the owner and entitled to the ore contained in the vein of the Victor Consolidated claim within the surface boundaries of the lode claims of defendant in error?

2. Has plaintiff in error acquired by virtue of its tunnel site location a right of way through the lode claims of defendant in error?

3. Has the plaintiff in error acquired by virtue of its tunnel site location, the ownership and right of possession to the blind veins cut therein underneath the claims of defendant in error.

4. Should plaintiff in error have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims previous to the location of the Ithica Tunnel site?

All these questions were answered in the negative by the Supreme Court of Colorado.

CROSS VEINS.

The first assignment of error brings before this Court for the first time the rights of a junior location of a cross vein within the side lines of a senior location under section 2336 of the Revised Statutes of the United States.

In the year 1879, the Hon. Moses Hallett, judge of the United States Circuit Court for the District of Colorado, in the case of Hall vs. Equator Mining company, held that:

> "After patent the patentee will be regarded as having the elder as well as the better

> title in all respects. This is true as to all things that are subject of the grant, but there still remains a question as to how much and what part of cross and intersecting veins are embraced in a patent."

"The general language of section 2322 seems to comprehend all lodes having their tops and apexes in the territory described in the patent, whether the same lie transversely or collateral to the principal lode on which the location was made.

Considered by itself, such would be the meaning and effect of that section. But there is another section relating to cross-lodes, which is of different import. It was numbered 14 in the original Act of 1872, Sec. 2336, R. S., 2nd Ed., and is as follows:"

> "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

It will be observed that by this section the first locator and patentee of a lode gets only such part of cross and intersecting veins as lie within the space of intersection to the exclusion of the remainder of such lodes and veins lying within his own territory. So far this section is in conflict with section 2322, before mentioned, and the matter of precedence between them is settled by

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an arbitrary rule established long ago. As between conflicting statutes, the latest in date will prevail, so between conflicting sections of the same statute, the last in the order of arrangement will control. Bacon's Ab. Stat. D. Dwarris 156 N.: Brown vs. Co. Com'rs, 27 Pa. 37. Smith vs. Moore, 26 Ills. 392.

The presumption that one section of the statute was adopted before another, seems to be very slight, and perhaps this rule has no other merit than to afford the means of solving a difficult question. But the rule appears to be well established, and to be applicable to the present case. It gives to section 2336 R. S. or section 14, as it stood in the original Act, a controlling effect over the prior section, and limits the right of the first locator of a mine in and to cross and intersecting veins to the ore which may be found in the space of intersection. If there are in fact two lodes crossing each other in these locations, the plaintiffs having the elder title by patent, have the better right, but it is limited as last stated."

Hall vs. Equator Co., supra.

In the case of Branagan vs. Dulaney, 8 Colo., 408, decided in 1885, the court said:

> "The two sections quoted appear to have been carelessly draughted, for they are certainly to some extent in conflict with each other. If the latter section contained the only provisions bearing on the subject, we would have no hesitation in saying that where two veins cross each other, as alleged to be the fact in the present case, the senior location (Hidden Treasure) would only be entitled to the ore at the space of intersection of the veins; and that the owners

of the cross lode (Patrick Branagan) would be entitled to all ore found in their vein within the side lines of the senior location, save at the actual space of vein intersection. If this is not the rule intended to be laid down in section 2336, then it would seem that the framers of that section are liable to the charge of using words to *disguise* instead of *express* their meaning. This construction, however, seems to be in conflict with a literal interpretation of section 2322, which gives to the owners of the senior location all veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside the surface lines of the senior location. It is possible that it was not intended by the framers of this section to include *cross lodes* in the grant of the prior location. But if such was the intention, we see no way out of the dilemma, except by the application of the arbitrary rule of construction suggested by court in the case of *Hall vs. Equator, etc. supra,* that, as between conflicting statutes, the latest in date will prevail, and, as between conflicting sections of the same statute, the last in the order of arrangement will control; to which rule of construction the court cites Bac. Abr. St. 'D;' Dwar. St. 156, 'N;' *Brown vs. Com'rs,* 27 Pa. 37; *Smith vs. Moore,* 26 Ill. 392."

"These authorities, and those cited therein, support the proposition that in the above case not only the cross-vein would be reserved from the prior grant, but likewise a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. Also, that

upon a grant of the cross-vein itself, such right of way would pass as incident to the grant."

In the case of Lee vs. Stahl, 9 Colo., 208, decided in 1886, the court held that:

> "In the case of Branagan vs. Dulaney, 8 Colo., 408, it is held that under sections 2322, 2336, R. S. U. S., when a junior mining location crosses a senior location, and the veins therein are cross veins, the junior locator is entitled to all ore found on his vein within the side lines of the senior location, except at the space of the intersection of the two veins. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross-vein. This decision rendered since the trial below, settles one of the principal points of contention involved in this case."

"Under the doctrine of Branagan vs. Dulaney, *supra*, and of the case of Hall vs. Equator Mining Co., therein cited, the effect of the provisions of section 2336 is to exclude a cross-lode, except at the point of lode intersection, as not a subject of grant. *Being excepted from the grant, it follows that the right to it is not lost by failure to adverse.*"

In the case of Margenson vs. Middlesex M. and M. Co., 11 Colo., 176, decided in 1887, the court said:

> "Since the trial of this case in the court below this Court has passed upon the main question presented by this appeal, holding that, when a junior mining location crosses a senior

> location, and the veins therein are cross-veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins."

The case of Lee vs. Stahl, 13 Colo., 174, was before the court for the second time and the rule laid down in the cases cited above was followed.

In Coffee vs. Emigh, 15 Colo., 184, decided in 1890, held that the rule laid down in the foregoing cases had become an established law.

In Oscamp vs. Crystal River Co., 58 Fed., 293, the court said:

> "The plaintiff in this case is endeavoring to assert his superior right to the surface ground included within the small triangle. He is not seeking apparently to recover and to hold the defendant's lode or vein; and even if he should prevail in this action the defendant would still retain its cross-vein within the triangle, except at the point of intersection of the two veins together with such right of way for the purpose of taking out mineral as is now accorded to the owners of a cross-vein when it passes through an older location." Citing Branagan vs. Dulaney, and other cases, *supra*.

In Enterprise Mining Co. vs. Rico-Aspen M. Co., 66 Fed., 200, the court in referring to the foregoing case, to illustrate a principle, said:

> "The owners of the Vestal claim took their

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patent subject to the right of the owners of the tunnel to the possession of any unknown veins in that claim subsequently discovered in the tunnel, just as they took it subject to the right of the owner of an adjoining mining claim, who never made any adverse claim to their location, to follow on its dip through their patented territory any vein which has its apex in his claim, and just as they took it subject to the right of a junior locator of a cross-vein, who has made no adverse claim, to remove from the territory covered by their patent the ore in that vein not within the space of intersection." Citing the foregoing cases.

In harmony with the foregoing decisions, we find the decisions of the Secretary of the Interior, and the Commission of the General Land Office. Ever since the Act of May 10, 1872, the Land Department has issued patents upon lode mining claims crossing each other, and has expressly recognized the case of Branagan vs. Dulaney, *supra*.

Branagan vs. Dulaney, 2 L. D., 744.
Black Queen Lode vs Excelsior No. 1 Lode, 22 L. D., 343.
Aspen Cons. Mining Co., 22 L. D., 8.
Rebellion Mining Co., 1 L. D., 554.

The Department will not issue a patent upon two disconnected portions of a lode mining claim unless the same be bound together by a continuous vein owned by the applicant. If the vein be broken or a portion of it taken away by a prior placer patent, mill site or agricultural entry, the patent will not issue upon the discon-

nected portions of the lode claim. The lode claim is considered a legal entity.

Apple Blossom Placer vs. Cora Lee Lode, 21 L. D., 439.
Andromeda Lode, 13 L. D., 147; Bi-Metallic Mining Company, 15 L. D., 309.
Howards Case, 15 L. D., 504.

It will be observed in the statement of facts that all of the lode mining claims in controversy in the case at bar were located at a time when the foregoing decisions had settled the law of cross-veins in Colorado. The Victor Consolidated claim was located in October, 1893, and soon thereafter the plaintiff in error, The Calhoun Gold Mining Co. purchased and developed the same at an expense of $15,000, with full confidence in the correctness of the foregoing decisions. The law of cross-veins had been so long followed that it had become a rule of property, and all of the mining claims involved in this controversy were located and patented with full knowledge of the law upon the question. Our rights were acquired and developed under this rule of property, and to change the rule now is in effect an ~~ex post facto~~ retrospective law in so far as it applies to us.

This Court should give great weight to the foregoing cases since it has been concurred in for so long a time and followed by such eminent judges. Mr. Justice Hallett, for more than twenty years has followed this rule in all his decisions, and there is no more able or profound judge of mining law probably in the United States than this eminent jurist. Twelve different judges, illustrious for their learning in this branch, as Judges of the Supreme Court of Colorado, have followed these decisions without a dissenting opinion until the present personnel of that court came into office. The

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Circuit Court of Appeals of the United States, in two different cases cited above, have stamped this rule with their high approval. To reverse the rule now would take from us that which we had reason to believe was a vested right in the Victor Consolidated vein.

In Rockwell vs. Nelson, 24 Ind., 424, the court said:

> "We have had occasion in the last few months to overrule a number of cases, but only in the class which operate upon the future and not upon the past, and which, in our opinion, will be attended with unmixed good.
>
> "We cannot change a decision without producing confusion in titles, and the ruling would necessarily relate back to the time when the law came into force. As now constituted, however much we may differ from the opinion of our predecessors, we shall not introduce doubt and confusion into questions of property by overruling the previous decisions of this Court."

In Broom's Legal Maxims, 8th edition, page 147, the author says: "It is then an established rule to abide by former precedence, stare decisis, where the same points come again in litigation, as well to keep the scale of justice even and steady and not to waver with every new judge's opinion, as also because, the law and that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to altar or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known law and customs of the land; delegated, not

to pronounce a new law, but to maintain and expound the old one—jus disere et non jus dare."

Depending upon the language cited in the case of Lee vs. Stahl, *supra,* for the past fifteen years,many locators of lode mining claims having prior and better titles have not adversed the applications for patents upon junior locations, *since the right to the vein in the conflicting territory was not lost by failure to adverse.* The surface was considered valueless, and only an incident to the vein. But now, under Judge Gabbert's decision, in the case at bar, not only has the prior locator lost the surface in conflict, but each and every vein having its apex therein. The far-reaching effect of this decision upon such cases will readily be seen when it is known that over ten thousand patents have been issued in the State of Colorado, and doubtless many of them were supposed to be governed by the rule laid down in Lee vs. Stahl.

And again, in Colorado lode claims are 300 feet in width, while the vein in most instances varies from a few inches to several feet in thickness. In many instances the owners of the cross-veins have mined, extracted and sold the ores therefrom within the side lines of the senior location. Should the rule be now changed, doubtless many damage suits would be instituted by the owners of the senior locations to recover for the ore so taken. Thus we may find that Judge Gabbert's decision in the case at bar, if affirmed by this Court, "has led to much confusion and has opened a fruitful source of litigation. Under it doubts have been cast upon titles to mining properties, and supposed rights reduced to uncertainties."

The first doubt ever cast upon the correctness of the foregoing rule by the Supreme Court of Colorado, is found in the case at bar. The court says:

"The first question presented involves par-

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ticularly, a construction of section 2336, *supra*. The rights of a junior location to the ore of its vein embraced in the conflict with a senior have been determined by this Court in Branagan vs. Dulaney, 8 Colo., 408, and in several subsequent cases which have adopted the doctrine announced in that case on this subject, and if we adhere to the law as announced in those cases, then the right of appellant to the ore in the vein of the Victor Consolidated, included in the territory of that claim conflicting with that of appellee, *are fixed and settled*, for under these decisions it would be entitled to all this part of its vein except where it intersects the vein of appellee's claims. It is contended by counsel for appellee that the ruling in Branagan vs. Dulaney and cases following it is wrong, and that this question should now be reconsidered. In opposition to reconsideration of the rights of cross-claimants, as declared by those cases, it is urged that the doctrine of stare decisis applies, and even if wrong, should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this state. We are aware of the gravity of reversing a long-established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this commonwealth have a right to presume that when a question has been once settled by this Court, that its decision is correct and that all may rely upon it. We understand, generally, that when a decision has been established a settled rule of property upon which rights are predicated (and es-

> pecially those relating to real estate) the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous—Black on Interpretation of Laws, chapter 152—but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has so long been the rule of action and relied upon to such an extent that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it."

Judge Gabbert recognizes the rule in Branagan vs. Dulaney as a "long-established precedent," but he proceeds to over-rule that case and cites Watervale M. Co. vs. Leach, 33 Pac., 418; Wilhelm vs. Sylvester, 101 Cala., 358; Pardee vs. Murray, 4th Mont., 234. We think his reasoning is illogical and does violence to the language of the Statute. He further says:

> "It is a matter of common knowledge that ever since the decision of this Court on that question its correctness has been doubted by many eminent members of the bar of this State familiar with mining law and has even been the subject of expression to that effect by this Court;" citing the Argonaut Co. vs. Turner, 23 Cala., 400.

We think the eminent jurist has misconstrued the latter decision. That case recognizes the rule in Branagan vs. Dulaney as settled and fixed. There is no attempt to disturb it. Courts should not be influenced by the

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private opinions of members of the bar. Those attorneys who have different opinions may not have investigated the question. If the decision of courts must be swayed by popular opinion there can be no stability to the law.

The court further says that the doctrine laid down in Branagan vs. Dulaney is not stare decisis, until the Supreme Court of the United States shall have passed upon the question. Technically speaking, this may be true; yet the rule has been followed so long that it has the same force and effect as a rule of property. Section 2336 has been correctly construed in Branagan vs. Dulaney; what is the meaning of "space of intersection?" An analysis of the first half of the section is necessary to a clear understanding. "Where two or more *'veins intersect'* or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the *'space of intersection.'* Here *'space of intersection'* relates back to *'veins intersect.'* *'Space of intersection'* then, must mean *'space of intersection'* of veins. No other construction is intelligible. The writers and courts atempting a different construction have found themselves in confusion, and they then pronounce the section ambiguous. All writers and courts agree that previous to the Act of May 10, 1872, each locator had but one vein; that where veins crossed each other the senior locator had the right to the ore in the "space of *intersection of the veins;*" that the junior locator had a right-of-way through the space of intersection; that rights which had attached previous to that date were in no manner disturbed; that these rights were preserved by section 2344. Now if section 2344 preserved these rights no other section was necessary for that purpose. But Judge Gabbert seems to think that section 2336 was also necessary and that when applied to veins located prior to May 10, 1872, intersection would clearly mean

the *"intersection of the veins,"* provided they crossed each other upon the strike. That when the Statute applied to parallel veins intersecting or crossing upon their dip located either before or after that Act, *"space of intersection"* would mean the *"intersection of veins."* Then the learned judge criticizes the Arizona case because it "fell into the error of holding that the *'space of intersection'* meant the intersection of the veins only." We agree, however, with Mr. Justice Gabbert when he states that the construction given by the Arizona court would "deprive a junior location made under the Act of 1872 of the right of way through the senior location if the former crossed the latter. "The California case is also subject to the same criticism. In that case the eminent jurist held that the section 2336 applied only to veins crossing on their dip, and thus would deprive the junior location of the right-of-way through veins crossing on their strike. Mr. Justice Gabbert says that the Montana case is not altogether clear, and here again we agree with him. In our opinion that case is susceptible of two constructions. It is not clear whether that court intended to follow the Colorado or the Arizona rule.

Mr. Justice Gabbert further says:

> "As we understand the rulings of the land department in issuing patent for conflicting mining claims there is always excepted from the surface of the junior that portion conflicting with the senior as well as all veins apexing within such conflict. This practice is in accord with our views, and although such a construction would not be controlling, the interpretation put upon that act by those whose duty it

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has been to construe, execute and apply it, is entitled to much weight."

The patent of the Victor Consolidated claim grants to The Calhoun Gold Mining Company "one thousand four hundred and ninety-six and nine-tenths feet in length along said Victor Consolidated vein or lode." Similar language is contained in the application for patent, the published notice, the application to purchase and receiver's receipt. The application for patent excludes *"area in conflict,"* but not the veins. The Register's published notice is "expressly excepting and excluding all conflict with surveys Nos. 7913 and 8178 *without waiver of lode claim rights."* The application to purchase, receiver's receipt and patent exclude the area and the veins.

In construing the clause *"excepting and excluding"* the court has fallen into an error which was not intended by the land department. *"Excepting and excluding"* does not mean abandonment or relinquishment. In Rebellion Mining Co., 1 L. D., 554, McFarland, commissioner said:

> "It is urged, however, that should this be done it would amount to an *abandonment* of all the ground in conflict. This is clearly a mistaken conclusion. *Such an exclusion is not a relinquishment."*

In Black Queen Lode vs. Excelsior No. 1 Lode, 22 L. D. 343, the Secretary of Interior said:

> "It is urged that this action (exclusion) by Hoover and Oscamp, is a waiver on their part of the ground in conflict. I do not so view it. If they had filed an abandonment of

the land, then it might be said that the entry by Black Queen would be permitted. But the showing here is only that they have excluded the territory from the entry. This they may do, and secure patent for the part thus entered, and hold the excluded ground under their possessory right." Citing Branagan vs. Dulaney, 2nd L. D., 744, decided by Secretary Teller.

In Aspen Mining Company, 22 L. D., 8, the clause "*especially excepting and excluding*" was again construed by the Secretary of the Interior, who held that it was not an abandonment nor a relinquishment. Various other decisions by the land department are to the same effect. These words are required by the land department in all patents where the surface conflicts with a senior patent; it is the act of the officers of that department, and not of the applicant, and the foregoing construction is uniform. Moreover, the law controls the patent; the patent is but the creature of the law.

Says Mr. Justice Field, delivering the opinion of the Court in Davies' Administrators vs. Weibold, 139 U. S., 507:

> "The officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion, they could limit or enlarge their effect without warrant of law. The patent to a mining claim carries with it such rights to the land which includes the claim, as the law confers, and no others,

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> and these rights can neither be enlarged nor diminished by any reservations of the Land Department, resting for their fitness only upon the judgment of those officers."
>
> Davies Admin. vs. Weibold, 139, U. S., 507, Id., page 527.

In concluding the discussion upon cross-veins the Colorado Supreme Court says:

> "Our conclusion is that the provisions of section 2336 apply to locations made under the Act of 1872, as well as before; refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case."

Thus the court makes the language of the Statute extremely flexible, making it yield to at least two different constructions, "according to the facts in each particular case." The court then pronounces the Statute ambiguous, and we are not surprised. This canon of construction is new to us, and the learned justice has not favored us with a single citation suporting it.

We think the meaning of section 2336 is clear and unambiguous; that "space of intersection" means intersection of veins and not of claims; that it applies to veins located before, as well as after the Act of May 10, 1872; that it applies to veins which intersect or cross on their strike as well as on their dip; that in considering this section great weight should be given to the rules and customs of miners in various mining districts, and

the Acts of Congress in force before the Act of 1872; that if sections 2322 and 2336 are in conflict, the last in order of arrangement will control; that, as suggested by Branagan vs. Dulaney Congress may not have intended Section 2322 to include cross-veins; that the length of veins is measured only by the end lines, not by the side lines; that when a claim is located there can be but one set of end lines.

It has been urged by several courts and text writers that section 2336 does not in express terms give the cross-vein to the junior location. Under the laws as they existed previous to the Act of 1872, the junior location was entitled to all of the ore in the cross-vein, save at the space of intersection of the veins. Section 2336 grants to the prior location the ore at the space of intersection of the veins only; the grant is limited to the ore at the space of intersection of the veins; the right of way through this space of intersection of veins is given expressly to the junior claim; by this limitation of the right of way, to the space of intersection of the veins, the subsequent location was recognized as having a way of necessity to follow its vein, and as having the right to the ownership and possession of the ore therein contained within the side lines of the prior claim.

The difficulty with most courts and text writers in construing the mining statutes is that they are continually endeavoring to make new laws, or else they try to make the mining acts yield to common law principles. Mining laws of the United States are purely statutory. That eminent jurist, Mr. Justice Brewer said:

> "We find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and if so,

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it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not what is equity, but what saith the statute?"

Del Monte M. & M.Co. vs. Last Chance M. Co., 171 U. S. 67.

RIGHT OF WAY FOR TUNNEL.

The second assignment of error, is as follows, to wit:

The Court erred in denying to the plaintiff in error, the right of way for its Ithica tunnel, located under Section 2323 of the revised statutes of the United States, through and across the Monarch, Mammoth Pearl and Ajax claims of defendant in error.

This assignment brings before this Court for the first time, the question, Does a tunnel located under said Section, have the right of way through and across a prior lode location?

Our contention is,

(1) That the tunnel has such right of way under said Section, by implication.

(2) By express legislation, Session Laws of Colorado, 1861, page 166, Mills Ann. Sts. Section 3141, "and persons working said tunnel shall have the right of way through all lodes which may lie in its course."

(1) According to the rules and customs of miners and the local laws in the various states and theritories, this right of way for a tunnel through a prior location has been exercised ever since mining was commenced in the United States. The tunnel may be three thousand (3,000) feet in length and the object of the law is to encourage development of the mineral resources. Development of those resources would be retarded if the tunnel locator were not permitted to drive through a prior lode location to

reach the undiscovered veins beyond. It would be a difficult matter to find a mining district so free from lode locations that a tunnel could be located to any advantage, without crossing them. If the tunnel be located across a prior lode location under the above Section, the owner thereof acquires the right to all blind veins in its course not previously known to exist, on each side of the prior location.

Tunnels are so located that the portal or face is usually near the foot of a mountain, and if the line of the tunnel happens to cross a lode claim, the undiscovered veins beyond the lode claim could not be reached by the tunnel, if there were no right of way. Thus, in most instances we should find that if the tunnel had no right of way, mining development would be retarded instead of encouraged; the intention of Congress would be thwarted.

(2) We recite here only that portion of the said Section of the Colorado Laws of 1861 pertaining to the right of way; that portion of the section relating to the length of veins was repealed by a subsequent law; Enterprise Mining Co. vs. Rico-Aspen Co., 66 Fed. 210. That portion of the Section, however, relating to right of way, has never been repealed either expressly or by implication. There is no subsequent law in Colorado contradictory to it, nor is it superceded by the said Section 2322 R. S. U. S. There is nothing in that Section which is repugnant to the law of Colorado, giving this right of way to tunnels; on the contrary, the Act of Congress expressly provides that the local rules and customs of miners in various mining districts, and the local laws of the various states and territories shall have full foce and effect where not repugnant to the laws of the United States. "Acts of Congress, when not repugnant, are supplemental to existing laws." Brodie Tunnel Co. vs. Brechtal 1 L. D. 588. This leaves in full force that portion of the statute of

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Colorado providing for such right of way. The repeal of a portion of one section of a statute does not necessarily repeal every part of the section. "The repeal extends only so far as inconsistency extends." Elrod vs. Gilliland 27 Georgia 467. People vs. Durick, 20 Cal. 94.

The said Section 2323 grants the undiscovered veins to the tunnel; grant of an estate is a grant of enjoyment. Section 2338, U. S. R. S. provides "as a condition of sale in the absence of necessary legislation by Congress, the local legislature of any state or territory may provide rules for working mines involving easements, privileges and other necessary means to their complete development, and these conditions should be fully expressed in the patent."

We think the right of way for the tunnel is clearly given when the local laws of Colorado are construed in connection with the Act of Congress as a whole. There are two or three cases in California pertaining to the right of way for tunnels, but in those cases the tunnel was not located under the Act of Congress, nor was there any similar state statute; hence these [illegible] are not applicable.

RIGHT OF POSSESSION OF VEINS INTERSECTED IN TUNNEL.

"The Court erred in denying to the plaintiff in error as the owner of the Ithica Tunnel site and mining claim, located under and by virtue of Section 2323 of the Revised Statutes of the United States, the right of possession of all veins or lodes within three thousand (3,000) feet from the face of said tunnel, on the line thereof, not previously known to exist, discovered in such tunnel within the exterior boundaries of said Monarch, Mammoth Pearl and Ajax Mining claims."

By an examination of the map it will be seen that

all of the veins intersected in the tunnel are cross-veins to the claims of defendant in error. In the agreed statement of the facts upon which the case was tried in the lower court, it will be observed that all the veins in controversy are blind veins; that they were never known to exist previous to the location of the tunnel. Now, if the rule as to cross-veins announced in Branagan vs. Dulaney be correct, and if we are correct in our second proposition, to wit: that the tunnel has a right of way, then we see no reason why we could not locate the cross-veins in the territory of defendant in error. We are familiar with the rule laid down by this Court in the case of Belk vs. Meager 104 U. S. 279; Gwillam vs. Donnellan 115 U. S. 45, and other similar cases, and we do not ask this court to overrule these cases. But we think the facts are different. Those cases were decided upon the theory that a trespasser could not make a discovery within a prior location. The land being appropriated. But if we have a right of way through our tunnel, and if the cross-vein intersected in the tunnel are excepted out of the patent of defendant in error, we are not trespassers, the veins were unappropriated.

In the Enterprise Mining Co. vs. Rico-Aspen Co., 66 Fed. 200, this precise question was not before the court, and yet the language of the Court is that the tunnel locator at the date of location of his tunnel, acquires an inchoate right to all blind veins not previously known to exist, crossing the line of the tunnel.

FOURTH ASSIGNMENT OF ERROR.

> "Should appellant have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl

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claims prior to the location of the Ithica Tunnel site?"

We are familliar with the case of Smelting Co. vs. Kemp. 104 U. S. 636, and other similar cases, and we have not overlooked the language of Mr. Justice Field, to wit: "We have so often had occasion to speak of the Land Department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that is creates an unpleasant surprise to find that counsel in discussing the effect to be given to the action of that Department, overlook our decisions on this subject."

But the facts in the case at bar are different. The Monarch and Mammoth Pearl claims had been located, application for patent had been made, and receiver's receipt had been issued at the time of the location of the Ithica tunnel site. The patent was not issued until after the Ithica tunnel site was located, but at the time of the issuance of the patent there had been no discovery of any vein in the tunnel. A patent is a grant of the legal title, and had the patent issued prior to the location of the tunnel, we would not discuss this question. We are not attacking the validity of the patent; we simply desire to show that it relates back to the inception of right only. If there were no discovery of mineral in place when the receiver's receipt was issued, the entry would be void. Hallett & Hamburg lodes 27 L. D. 112. Receiver's receipt does not create a right; it only protects such rights as have already been created; patent relates back to inception of right only. McMurdie 8 C. L. O. 36, 194-9 C. L. O. 151. Land must be legally appropriated in order to sever it from public domain. Wilson vs. Jackson, 13 Peters 498. When patent issues, the fact that mineral was discovered before issuance of patent is settled; this is not the case with receiver's receipt; that instrument may be

cancelled by the Land Department at any time before the issuance of patent, by showing that there has been no discovery of mineral or rock in place within the limits of the location. Thus the question arises, to what date does the patent relate? The decisions of this Court are not in harmony upon this point. As far as we can determine from the various decisions, the patent relates back to the discovery of ore within the limits of the location, and if there were no discovery of ore within the limits of claims of defendant in error at the time of the location of the Ithica tunnel site, then the patent does not relate back to a time prior to the location of the tunnel. Our purpose in offering to show these facts was that our tunnel might be adjudged to be superior in point of time to the Monarch and Mammoth Pearl claims and thus make the patent subject to the rights of the tunnel and invoke the law as announced in Enterprise Mining Co. vs. Rico-Aspen Mining Co. 167 U. S. 108, and Ellet vs. Campbell 167 U. S. 116.

We submit that the decision of the Supreme Court of the State of Colorado should be reversed.

Respectfully Submitted,
W. E. SO RELLE,
Attorney for Plaintiff in error.

22519

Supreme Court of the United States.

THE CALHOUN GOLD MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE AJAX GOLD MINING COMPANY.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The brief of defendant in error was filed on the day before the oral arguments, and by leave of the court first had and obtained we are now permitted to file this reply brief.

THE FIRST ASSIGNMENT OF ERROR.

The subject of this assignment involves a construction of section 2336, Revised Statutes; it was numbered 14 in the original act of 1872.

We have made a very careful examination of the Congressional Records and find "an act to promote the development of the mining resources of the United States;" approved May 10, 1872. (See appendix to Congressional Globe, second session, Forty-second Congress.) The bill in its original form was introduced in the House by Mr. Sargent,

of California (H. R. 1016), Congressional Globe, second session, Forty-second Congress, 395. This bill was immediately referred to the Committee on Mines and Mining, and on the 8th day after its introduction Mr. Sargent, chairman of the committee, "reported back the bill, with recommendation that it do pass," and on that day it was passed (Congressional Globe, *supra*, 532). Mr. Sargent was requested to explain the bill, since the other members were not familiar with practical mining and had had no opportunity to examine the new bill. Mr. Sargent said: "I will endeavor to explain the bill if gentlemen will give me an opportunity. It does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest degree the policy of the Government in the disposition of the mining lands. It does not increase or decrease the amount of lands or extent of leads that a miner may acquire under the mining laws." He then points out what he claims to be the only changes, to wit, that it facilitates miners in acquiring title with less trouble and with less expense; that it is merely a change of process and not of substance, except as to tunnel rights, and on this question he says: "There is another feature of the bill supplemental to the former legislation of Congress, and that is where a man or company starts and runs a prospecting tunnel, which is a work of great labor and of large expense, and they are nearing the object of their search, believing from geological indications that there is a lode of gold or some other mineral in the mountains, they shall not be deprived of the fruits of their labor by some party who comes in after they have prosecuted their work nearly to com-

pletion, and locates the lode which was not known to exist at the time they commenced their enterprise—that is to say, if they discover by their skill, industry, and perseverance a lode they shall be entitled to the benefit of it. This bill allows miners to take 300 feet on each side of their claim. By the legislation as it now exists the amount is unlimited. * * * Where a lode is known to exist any person may locate it under the mining laws of the United States; but in a case of this kind, where parties run a tunnel and actually discover the lode, this legislation provides that they shall have a right to it" (Congressional Globe, *supra*, 534).

The bill then went to the Senate and was there amended. Section 14 was not in the original bill, but first made its appearance in the amendment. The amendment was in the nature of a substitute, but there was no material change from the original bill except the addition of section 14 (Congressional Globe, *supra*, 2456).

There is a slight difference between section 14, as approved, and section 2336, Revised Statutes.

SECTION 14. "That where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection: *Provided, however, that* the subsequent location shall have the right of way through *said* space of intersection for the purposes of the convenient working of the *said* mine: And *provided also, that* where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

When the bill, as amended, was returned to the House, Mr. Sargent said: "The amendment which comes from the

Senate is in the form of a substitute; yet the variations as passed by the House are very trifling" (Congressional Globe, *supra*, 2897). No other explanation was made to the House.

In the Senate the amendment was offered by Senator Stewart, of Nevada, and when the bill was reported back to the Senate by the Committee on Mines and Mining Mr. Stewart said: "There is no time this morning for any one to explain the various details of this bill, and I will not attempt to do it. It is very important that it should be passed. With the consent of the Senator who reported the bill, I wish to state that in the first instance miners legislated for themselves. Congress finally, in 1866, passed a bill embodying many of the principles of this bill, and from that time to this the Land Office has operated under it" (Congressional Globe, *supra*, 2457).

Then followed considerable discussion as to the length along the vein given under one location, but in this respect the bill permitting 1,500 feet was not changed. Neither in the House nor Senate was there any discussion whatsoever concerning any but the discovery vein, except Mr. Sargent's explanation of tunnel rights above.

An examination of the Congressional Records reveals the fact that this bill was rushed through both House and Senate, and that but little explanation was given of the real changes from the act of 1866. It must be presumed that the members of Congress were familiar with that act, since it had been the law for six years, although the members of the House disclaimed any knowledge of practical mining or the practical operation of the new bill. They depended upon the explanations given above, and in these explanations we find the real intent of the legislators. Both Mr. Sargent

and Senator Stewart, coming from the mining region, were familiar with practical mining and the application of existing laws. They were the expounders of the new bill; they announced the construction that should be placed upon it at the time of its enactment; and now to discover the intent of Congress we must turn back to the former law, for those expounders of the new bill said:

"It does not make any important changes in the mining laws as they have heretofore existed. * * * It does not increase or decrease the amount of lands or extent of leads that a miner may acquire under the mining laws."

It is then clear that Congress did not intend section 2322, Revised Statutes, to include cross or intersecting lodes save at the space of intersection of the veins; that was the former law.

Moreover, said section 2336 was an amendment, and it was drafted by Senator Stewart, whose ability to express himself in clear, concise, and unambiguous language has never been questioned. At that time he was the foremost mining lawyer of the country. Amendments have always received great consideration from this honorable court. They express the last and the best thoughts of the legislators; their controlling effect over other sections of the same statute is well recognized. This section is clear-cut and unambiguous. We insist that it should be construed, and that not one word should be changed or modified. The sole question is "what saith the statute?" If sections 2322 and 2336 are in conflict, the former must yield to the latter.

It is a canon of construction that the courts construing a statute soon after its enactment should have greater weight

than recent decisions. Hall *vs.* Equator Company was decided by Judge Hallett in 1879, and this was the first decision upon the questions involved. Even then his decisions on mining law were recognized as authority. His profound learning upon this subject is recognized throughout the mining States. His construction of section 2336 has been followed in Colorado by both State and Federal courts for the past twenty years. The decisions in other courts giving a different construction are comparatively recent.

Counsel for defendant in error have classified these later decisions under three heads, and we will discuss them in the order given in their brief.

(*a.*) THE ANTE-1872 CONSTRUCTION.

They assert that the last clause of section 2336 refers to the union of veins on the dip. This we concede. Then they say that the first two clauses refer to veins on their strike or dip, and when they refer to veins crossing on their strike the language is limited to veins located prior to the act of May 10, 1872. We concede that the language is applicable to the crossing of veins, both on their strike and dip, but there is no limitation in this section to veins located prior to May 10, 1872. The language is plain, positive, and explicit and covers all veins, intersecting or crossing, regardless of the dates of location.

And again their construction would deprive the subsequent location of the important right of way through the space of intersection of all veins crossing on the strike, located after the act of 1872, and to this extent section 2336 would be rendered a nullity.

This right of way guaranteed to the subsequent location through the space of intersection of veins crossing each other on the strike is frequently of more value than the ore contained within the space of intersection. Where a junior locator sinks his shaft upon his vein to a great depth and at large expense the right of way through the space of intersection of the veins to the valuable ore lying beyond may be of vast importance. It may save him the expense of sinking a new shaft on the opposite side of the intersection, whereas to drift from the bottom of the old shaft through the space of intersection would be of but little expense in comparison with the sinking of a new shaft. Section 2336 was intended to cover this condition.

(*b.*) THE UNION ON THE DIP CONSTRUCTION.

Here counsel claims that section 2336 is confined to a crossing or union of veins on their dip; that it does not apply to the crossing of veins on the strike. This is their pet theory, and in oral argument they practically repudiated the other constructions suggested in their brief.

What we have said in the foregoing discussion applies equally here. In their brief, page 27, counsel say:

"True it does not expressly speak of the crossing or union of veins *on their dip*. But it is dealing with a condition *created by the act itself*."

We think that section 2336 is dealing with a condition created by nature. It deals with known physical facts and makes no attempt to change nature's laws. Nature has caused veins in "countless thousands" to cross each other

on their strike. This crossing on the strike is conceded in the statement of facts upon which the case was tried; but in what mine or in what country have two veins crossing solely on their dip been exposed? This question was propounded in the lower courts, but no answer comes. Such a condition would be a geological phenomenon. Laws are enacted to cover known facts, not theories. When veins come together on their downward course they unite and become one vein. The last clause of the section provides for this condition; the first two clauses provide for veins crossing either on their strike on dip.

On page 28 of their brief opposing counsel say "the punctuation is a little unfortunate; but the use of the co-ordinate conjunction 'and' at the beginning of the last clause establishes a close connection between it and the two preceding clauses." But this fond hope must fade when it is observed that the last clause in the section as approved was originally a *proviso*.

Counsel then urge that this section was intended to preserve existing rights, but they are protected by section 16 of the original act.

SECTION 16. "That all acts or parts of acts inconsistent herewith are hereby repealed: *Provided*, That nothing contained in this act shall be construed to impair in any way, rights or interests in mining property acquired under existing laws."

(*c.*) INTERSECTION OF LOCATIONS CONSTRUCTION.

It will be observed that in either of the foregoing constructions something must be injected into or taken away from the statute. No court nor text-writer has ever

been able to follow either of these constructions without first making some change or modification of section 2336. After making such changes they find it ambiguous; then they construe away a portion of its meaning. Courts should simply construe the section. Congress alone has the right to repeal it.

The last construction offered by counsel has never been followed by any court, except, possibly, the supreme court of Montana and the supreme court of Colorado in this case.

Counsel claim that the former Colorado rule is in conflict with certain Federal court decisions, and they cite Del Monte *vs.* Last Chance Company, 171 U. S., 55.

In that case there was but one vein and it was the discovery vein; the question of cross-veins was not before the court. In the case at bar the Victor Consolidated is conceded to be a cross-vein, and that it was not known to exist till we discovered it in the Victor Consolidated discovery shaft; this vein crosses the side lines of the Monarch and Mammoth Pearl claims, and it crosses one side line and one end line of the Apex claim; it crosses each of the veins of t' e claims on their strike. The language of the case cited above is *obiter dictum.*

The supreme court of Colorado said, *inter alia*, as to the meaning of the term, space of intersection:

"Our conclusion is that the provisions of section 2336 apply to locations made under the act of 1872 as well as before; refer to the intersection and crossing of veins either upon their strike or dip; that the space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims according to the facts in each particular case, grants a right of way to the junior claimant for the convenient working of his mine

through such space upon the veins (and underneath the surface) which he owns or controls outside of that space."

The term in question should have a fixed and definite meaning; the same term should not be held to have different meanings in the same section or in the same act. If we grant, for the purposes of the argument, that space of intersection as it is found in the first sentence of the section in question may mean space of intersection of claims, the term cannot reasonably be held to have that meaning as it occurs in the last sentence. This sentence refers to veins uniting on the dip. It refers to veins in their descent into the earth. It provides for ownership below "the point of union, including all the space of intersection." If space of intersection, as used in this sentence, be held to mean space of intersection of claims, then the section would extend the terms of grant to the owners of senior surface claims beyond the words of section 2322, and would deprive the owner of junior claims of that which is specifically granted under that section. Under section 2322 the owners of surface claims are entitled to "the exclusive right of possession and enjoyment of all the *surface* included within the lines of their locations, and of all *veins, lodes, and ledges* throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." Under this section the owner of a junior claim is granted specifically the right to follow his vein upon the dip into a senior surface location. The Government in making a

grant to the owner of a surface location makes a grant subject to the right aforesaid.

If the term space of intersection, in the last sentence of section 2336, be held to mean space of intersection of claims, then the owner of a surface claim would be entitled to all that portion of a vein having its apex outside of the side lines of such surface location included within the planes of the side lines. The right of the owner of the apex of a vein would thus be limited by the plane of the side line of his claim out of which his vein extended. As this would be an absurd conclusion and would nullify entirely the intent of section 2322, so far as following veins upon their dip is concerned, this interpretation cannot be adopted. Therefore this term in this sentence must be construed to have a fixed meaning, and that is, space of intersection of veins. If, then, in the first sentence of this section the term may mean space of intersection of claims, or of veins, according to the varying circumstances of cases, then the same term in the same section of the same act has entirely different meanings.

If this term "means either intersection of vein or conflicting claims according to the facts of each particular case," then the court before which the case is brought, involving this section, ceases to be the construer or interpreter of the section, and the jury performs such function.

When it is said that to give any part of the space of intersection of claims to the holder of a later location would be to take from the older location something already granted to it the entire question is begged, for the reason that it is assumed in such a statement that the older location has been granted all of the cross-veins within the

limits of the prior location. The patent cannot limit the statute nor can it extend the terms of it. The extent of the grant must be determined by the words of the statute. The meaning of the statute must be determined by rules of interpretation and of construction which are well settled.

There is no disputing that after the passage of the act of 1866, and prior to the act of 1872, the owner of a junior location could follow his vein upon its strike within the side lines of a senior location up to the very point of intersection of the junior with the senior vein. At the time of the passage of the act of 1872 space of intersection had a definite meaning. It meant space of intersection of veins, and of veins alone. A patent granted under the act of 1866, however broad its terms, granted only the right to a specific vein and to one vein. Under the act of 1872 other veins than the location vein were granted, but there is no presumption that there are any other veins within a claim than the location vein. It is intended under the act of 1872 that location shall be made along the strike of a vein and not across its course. If there is any presumption as to the direction of a vein or of veins within a claim, that presumption is that the direction of such vein or veins is in the direction of the surface location. It is stated in the opinion of the supreme court of Colorado that if space of intersection means of veins and not of claims, then there would be no right to a junior locator of a cross-vein to follow such vein within the senior to the point of intersection of the vein. This begs the entire question for the reason that it assumes that a patent issued under section 2322 grants all cross-lodes as well as those having their general course in the direction of the location of the

senior claim. If space of intersection used in section 2336 at the time of the adoption of this section and of the passage of the act containing it had a definite and known meaning, that same meaning must be adhered to now.

The decisions heretofore cited in the brief filed in this court by the plaintiff in error show that such expression did have a definite meaning at that time, and that it is only in these latter years that a new interpretation has been given to it.

Surface rights are merely incidental to rights granted on account of the location of a vein. If there be no vein there can properly be no mining claim. Section 2320 provides, *inter alia*, "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Section 2322 grants the exclusive right of possession "of all the surface," etc. Below the surface nothing is granted according to the specific terms of section 2322 than veins, lodes, and ledges having their apexes within the surface lines of the claim. Below the surface nothing is referred to but veins, lodes, or ledges, but the right of way referred to under section 2336 is a right of way "*through* the space of intersection for the purposes of convenient working of the mine." There is no right of way granted *over* any space of intersection. Underground working is what is referred to.

If the term, space of intersection, be interpreted to mean space of intersection of claims, then either the right of exclusive possession of the surface to which a senior locator is entitled would be interfered with, and section 2322 limited in that respect, or the right of way would extend *to* the sur-

face; and the portion of the first sentence of section 2336 after the semicolon would read in effect:

"but the subsequent location shall have the right of way through all of the territory in conflict, except the surface, for the purposes of convenient working of the mine."

The subject of section 2336 is veins. The first clause refers to veins and specifies veins. In that clause the words "intersect or cross" are indissolubly connected with the word "veins." The words immediately following, "*priority of title shall govern*," refer to veins. Thus far the word location has not been used. When in the following clause the words "such prior location" are used they attach themselves to the preceding words, and can mean nothing else than prior location of veins. Veins, lodes, or ledges are the subjects of location. If this be true, then the first use attaches itself to veins and not to the word *location* changed into the word "claim." The word "claim" does occur in the following portion of the first sentence. The words "subsequent location" continue to refer back to a preceding portion of the section, and if those words attach themselves to the word *veins*, then the term *space of intersection* following refers to space of intersection of veins. It has been heretofore shown that in the last sentence the term must mean space of intersection of veins, and therefore the expression has the same meaning throughout all portions of the section.

If this construction of the act be adopted there is no necessity to deal with the subject of reservations or of exceptions. It is useless to consider whether any right is reserved or any right is excepted from the grant. The statute itself determines the extent of the grant.

Under the act of 1866 the owner of the junior claim could work his vein within the senior claim up to the intersection of the two veins, but no right of way through the senior vein was granted by the act, nor was any provision made in it as to the ownership of the ore within the space of the intersection of the veins. This was the evil intended to be remedied by section 2336.

According to all canons of construction the decision of Judge Hallett in Hall *vs.* Equator Mining Co., Fed. Cases No. 5931, in 1879, was correct, and the supreme court of Colorado in the case now under discussion committed an error.

THE SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR.

In interpreting the statutes of the United States in relation to the rights of tunnels, such interpretation should be made as to carry into effect the object of those statutes.

In the Enterprise Mining Co. *vs.* Rico-Aspen Mining Co., 66 Fed., 200, the circuit court of appeals of the eighth circuit said:

"It has been the settled policy of the United States from the passage of the first act of Congress opening the mineral lands of the nation to exploration and occupation of July 26th, 1866, to the present time, to encourage the discovery and development of the mineral resources of the country."

These mineral resources, so far as the gold and silver are concerned, occur in the form of veins breaking through the surface of the earth's crust in the form of irregular deposits or in the form of placers. From this outcrop at the earth's surface others may be easily discovered by sinking a few

feet in the wash; others are hidden hundreds of feet below the surface with no indication on the surface that they exist. "The settled policy" includes the development of the last as well as of the first. To encourage prospecting for and discovering what are called "blind lodes" section 2323 was inserted in the act of Congress. No interpretation should be made of the act which will minimize this section.

This honorable court, in Enterprise Mining Co. *vs.* Rico Mining Co., 167 U. S., 108, said:

"It may be true, as counsel claim, that this construction gives the tunnel and excavation some advantages. Surely it is not strange that Congress deemed it wise to offer some inducement for running a tunnel into the side of the mountain. At the same time it places specific limitations on the rights which the tunnel-owner could acquire. He could acquire no veins which had theretofore been discovered from the surface; his right reached only to blind veins, as they may be called—veins not discovered from the surface before he commenced his tunnel."

In this quotation this court has suggested the interpretation which will carry out a "settled policy" to encourage the discovery and development of the mineral resources of the country. Such interpretation would result as follows: The owner of a surface claim properly located before the location of a tunnel site would be entitled, as against a tunnel-owner, to his discovery vein, the specific vein on account of which a grant was made, and to all other veins having their apexes within the surface boundaries of his claim and discovered from the surface before the tunnel was located. The tunnel-owner would be entitled to all veins which were not discovered from the surface before

he commenced his tunnel. If it be finally held that simply by sinking a discovery shaft upon a vein, staking upon the surface the boundaries of the claim, recording the location certificate, segregates from the public domain all veins and all territory within the boundaries of the claim; that said alleged rights may be maintained by the performance upon the claim until application for patent of the insignificant amount of labor required, and that a tunnel-owner can neither drive his tunnel through the claim nor be entitled to blind veins—veins not known to exist at the time the tunnel was located—section 2323 will be in effect a nullity. In no mining district could a tunnel of any prospective value be located except in one in which the tunnel locator happened to be the first upon the ground. A tunnel cannot wind and twist its way around and through a mining district in order to avoid prior located claims. It must be run in a straight line. Its course must be marked upon the ground, and that course must be approximately followed. Each claim in a district is entitled under the act, if there be no conflicting claim, to fifteen hundred feet along the course of a vein, which would require but few claims to extend across the entire district.

It is known that within a short time after the discovery of value within a district the entire territory offering hope of reward is covered with locations. There are few places within a district at which a tunnel site can be so located as that a tunnel may be properly run therefrom. It is thus seen that section 2323 must in effect be a nullity unless it be so interpreted as to enable a tunnel-owner to run through a claim located prior to the date of the location of the tunnel.

If the law be interpreted as we contend that it should, then an incentive is given to the owner of a surface location to prospect that location diligently, for the purpose of discovering the veins therein, for the reason that any vein which would be discovered prior to the location of any tunnel across his location would be his; and an incentive would be given to prospective tunnel locators to develop the hidden mineral resources which may not easily be discovered from the surface.

If it be said that if such a construction be adopted, then the grant under section 2322 is limited, the answer is that any grant made under any one section of the act and any grant made under the act is subject to all the provisions of the act. A grant under section 2322 would be made subject to all following sections. If there be a conflict between the different sections of the same act, and it is impossible to reconcile all of the provisions of the act by any construction, then those sections which follow must govern rather than those which precede; and if there be a conflict between an amendment to an act and any portion of the act which was in force prior to the amendment, the amendment must govern. If it be held that section 2322 refers primarily to surface locations to veins, lodes, or ledges discovered from the surface, and that section 2323 refers primarily to veins, lodes, or ledges not previously known to exist and not appearing on the surface, an interpretation will be adopted which will harmonize both sections. The terms of the grant then, under section 2322, would in effect be as follows: That the owner of the surface location located prior to the location of a tunnel would be entitled to the exclusive possession of the surface ground within the lines of his loca-

tion and of the veins, lodes, and ledges throughout their depth, the top or apex of which lies inside of such surface lines extended downward vertically, discovered and disclosed within the boundaries of the claim prior to the location of a tunnel across the claim.

This honorable court in Enterprise Mining Company *vs.* Rico-Aspen Mining Company, 171 U. S., 108, cites with approval the language of the circuit court of appeals, to wit: "Veins or lodes discovered on the surface or exposed by shafts from the surface must be *found* before any right to them vests." This language is in harmony with Mr. Sargent's explanation quoted above, to wit: "Where parties run a tunnel and *actually discover the lode*, this legislation provides that they shall have a right to it." In the statement of facts it is conceded that we *found* all the lodes in controversy, and that they do not appear on the surface and were not known to exist previous to the location of our tunnel.

In Del Monte Mining Company *vs.* Last Chance Mining Company, 171 U. S. Rep., 66, this honorable court said that "It needs no argument to show that if this were the only section (2319) bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given and upon what conditions they may be exercised. And it must be borne in mind in considering the question presented that we are dealing simply with statutory rights."

In this case the court held that section 2319 was modified and controlled by section 2322.

During our oral argument before this honorable court Mr. Justice White propounded the following question, to wit: Does not your construction of the tunnel section deprive the prior surface location of property rights? And we gave a negative answer and said that under the rule of construction announced in the case of Del Monte Mining Company *vs.* Last Chance Mining Company we should turn to the following sections to see what tunnel rights were given and upon what conditions they might be exercised: that section 2319 was modified and controlled by section 2322, and that each of these sections was modified and controlled by section 2323; that common-law principles were not applicable; that the patent to the surface location did not include the blind veins within the exterior boundaries of the claim, which were not known to exist at the date of the location of the tunnel; that title to such veins remained in the Government until the tunnel was located; that since the right to such veins never passed to the older location, it was not deprived of any property rights; that all the sections of the mining act must be construed together and not separately.

Under the fourth assignment of error the opposing counsel cite many authorities to show that we cannot attack their patents in a collateral proceeding. We concede the correctness of this proposition. We do not attack their patents, as shown in our former brief. We simply desire to show that the patents of the Monarch and Mammoth Pearl claims do not relate back to a time previous to the location of our tunnel. We claim the right to show this under Enterprise Min-

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ing Co. *vs.* Rico-Aspen Mining Company, *supra*. The cases cited in our former brief support our contention.

We respectfully submit that the supreme court of Colorado in the case now under discussion committed error and should be reversed.

Respectfully submitted.

W. E. So Relle,
Attorney for Plaintiff in Error.

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In the Supreme Court

OF THE

UNITED STATES.

THE CALHOUN GOLD MINING COMPANY, *Plaintiff in Error*, vs. THE AJAX GOLD MINING COMPANY, *Defendant in Error*.	*No. 195.*

BRIEF OF DEFENDANT IN ERROR.

This cause was originally tried in the District Court of the state of Colorado. The trial was to the court without a jury, and on an agreed statement of facts. Based upon this statement of facts four propositions of law were argued and submitted.

The District Court of the state rendered judgment in favor of the plaintiff, The Ajax Company, upon all the questions of law so submitted.

From that judgment, The Calhoun Company, defendant in the cause, took its appeal to the Supreme Court of the state. In the latter court, upon full argument and mature consideration, a judgment was rendered affirming the judgment of the trial court throughout.

To review the judgment so rendered by the Supreme Court of Colorado, the present writ of error was sued out from this Honorable Court by The Calhoun Company and the cause is brought here under the federal statute controlling such proceedings. No jurisdictional question is interposed, and the whole case is submitted for decision upon the merits.

There being no controverted questions of fact, and the facts being comparatively few and simple, the present record is entirely freed from many of the difficulties usually attending reviews in important cases by this Honorable Court.

I.

THE FACTS.

As above suggested, the facts upon which the decision of this court is solicited are, for the purposes of such decision, uncontroverted. They show

a controversy between The Ajax Company, the original plaintiff, the owner of certain lode claims, and The Calhoun Company, the original defendant, claiming ownership of a tunnel, and also an alleged cross lode location, both being junior to plaintiff's claims. Plaintiff in error asserts ownership of certain lodes cut in said tunnel upon the ground of defendant in error; it also asserts ownership of the ore in its alleged cross vein within the territory of the defendant in error, under a construction of the statutes formerly given by the Supreme Court of Colorado. An examination of the statement of facts, exhibits and admissions in the pleadings discloses the following, to wit:

First. That defendant in error is the owner in fee of three patented claims, namely, the Apex, Monarch and Mammoth Pearl, on Battle mountain in the Cripple Creek mining district, Teller county, Colorado; that applications for patent were filed—on the Apex, March 31, 1893, and on the Monarch and Mammoth Pearl, May 9, 1893; that receiver's receipts issued—for the Apex, January 16, 1895, and for the Monarch and Mammoth Pearl, March 6, 1895; that patents issued—for the Apex, April 22, 1895, and for the Monarch and Mammoth Pearl, September 6, 1895.

Second. That plaintiff in error was owner of the Ithaca tunnel and tunnel site, and also of the Victor Consolidated claim in the same locality; that the Ithaca tunnel site was located (and the

tunnel begun) August 19, 1895; that the Victor Consolidated was located November 2, 1893, and patent issued January 25, 1897; and that the Victor Consolidated location as marked on the surface, intersected the claims of defendant in error for a distance of upward of 600 feet. By reference to the plat shown in the printed abstract, the position of these properties will be seen at a glance. The patent of the Victor Consolidated, owned by plaintiff in error, covered and conveyed only those portions of the territory shown upon the plat colored in red. All of the intervening territory where the Victor Consolidated conflicts with the Apex, Monarch and Mammoth Pearl claims, belongs to defendant in error.

Third. That the patents of defendant in error expressly cover and include all of this apparent surface conflict; that these patents also grant to defendant in error "all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of" such conflicting ground, that the receiver's receipts of defendant in error likewise make the same grant in the same language. Further, that the application of plaintiff in error to purchase the said Victor Consolidated claim, its receiver's receipt and its patent expressly mention the said claims of defendant in error, and exclude from the Victor Consolidated all the territory within the surface boundaries of the Victor Consolidated location embraced in the said mining claims of defendant in error, "together with all

veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground."

Fourth. Thus it appears that the tunnel rights of plaintiff in error, whatever they may be, were acquired by a junior location made four years subsequent to the location of the claims of defendant in error, over two years after application for patent therefor, over seven months and five months respectively after issue of the receiver's receipts, four months after the Apex patent itself had been issued and but eighteen days before the Monarch and Mammoth Pearl patent issued.

Thus it also appears that the Victor Consolidated claim of plaintiff in error was located two years after the claims of defendant in error were located, eight months and seven months respectively after application for patent thereon, and while the patent proceedings of defendant in error were so pending in the United States Land Office.

Finally, thus it appears that all of the conflicting ground between said claims of defendant in error and the said Victor Consolidated claim of plaintiff in error "together with all veins, lodes and ledges throughout their entire depth, the tops or apexes of which" lie therein, were expressly conveyed to defendant in error in fee simple by the solemn grant of United States patents; likewise, that all such territory, and all such veins were expressly reserved and excluded from the grant to

plaintiff in error in the Victor Consolidated patent.

Fifth. Moreover, the following facts are not disputed, viz:

That the patents of defendant in error are, and ever since their issue have been in full force and effect;

That no direct effort has ever been made to attack them for fraud or otherwise, nor has there been, or is there now pending any attempt to set them aside;

That down to the time of the trespass by plaintiff in error by means of its said tunnel, defendant in error remained, under its patents, in the quiet, peaceable and undisputed possession of the whole of its territory, with all veins therein, and all rights and appurtenances thereunto belonging; and,

That plaintiff in error without the consent of defendant in error entered upon the latter's ground with said tunnel at a depth of about 100 feet below the surface, and without the consent of defendant in error, ran the same 900 feet into its territory, cutting nine or ten veins in so doing.

Certain subordinate and associate facts also appear; but the foregoing constitute the leading, salient and controlling facts in the case.

II.

THE LEGAL PROPOSITIONS SUBMITTED.

Upon the foregoing facts certain legal propositions properly arise, and are submitted for decision. These questions of law are stated in the brief of plaintiff in error. We restate them in the order in which we propose to present them in the following argument:

1st. Whether or not plaintiff in error is the owner of, and entitled to the ore contained in the vein of its Victor Consolidated claim within the surface boundaries of, and across plaintiff's lode claims.

2d. Whether or not plaintiff in error acquired, by virtue of its said tunnel site location and tunnel, the ownership and right to the possession of the veins or lodes not appearing on the surface, and not known to exist prior to the date of the location of the tunnel site, within the territory patented by and belonging to defendant in error.

3d. Whether or not the Ithaca tunnel, so belonging to the plaintiff in error, was and is entitled to a right of way through the said prior patented mining claims of defendant in error.

4th. Whether or not plaintiff in error was entitled, under the law, to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth

Pearl claims of defendant in error, prior to the location of said tunnel site.

Thus it will be seen that while the facts in the case are comparatively few and simple, the legal questions involved are of the most grave and far reaching importance.

III.

THE CROSS LODE QUESTION

By turning again to the plat in the abstract of record, Your Honors will see that the Victor Consolidated claim belonging to plaintiff in error was located across the Monarch and Mammoth Pearl claims, and also, to a large extent, lengthwise of the Apex claim of defendant in error. As above stated, such location was made a number of years after the locations of the three claims of defendant in error, and while patent proceedings were pending therefor. The only territory that the Victor Consolidated could get was the two small and irregular shaped pieces of ground colored red. The Victor Consolidated claim was located upon a vein which, according to the statement of facts, extends lengthwise of that claim from one of the red pieces of ground to the other, and through the intermediate territory belonging to defendant in error.

What we have denominated the cross lode question is peculiar to the state of Colorado.

While locations of segregated territory have been allowed elsewhere, and the segregated portions have been patented, as in the case of the Victor Consolidated, yet nowhere else in any of the mining states or territories, save in Colorado, has the locator of such a claim been given any right to the vein upon which he locates, within the conflicting territory belonging to the senior locations. As we shall presently see, in California, Arizona and Montana, the question of ownership of such vein through the territory belonging to the senior location and patented claim, has arisen and has been determined by the courts of last resort against the contention of the junior cross lode locator. That is to say, the courts of those states and that territory have held that a junior cross location owner can only follow his vein on its strike to the point where it enters the territory of the senior location, and from the point where it departs from such territory on the other side.

In Colorado, however, by a series of decisions beginning with Hall vs. The Equator Co., in the United States Circuit Court, and Branagan vs. Dulany, 8 Colo., 408, in the State Supreme Court, a different view was originally taken. By these decisions it was held that junior cross lode claimants, like the owner of the Victor Consolidated, were entitled to the vein upon which such locations were made, through the entire space of intersection with the senior lode locations or claims, except only as to the ore at the

comparatively small and insignificant space of intersection of the vein itself with the location vein of the senior claim. That is to say, although the cross lode location was made long and subsequent to the location of the claim with which it conflicted, or even subsequent to the patenting of such claim, yet the owner of the junior cross lode location became also the owner of his vein entirely through the conflicting territory, except at the space of its vein intersection.

This doctrine or construction of the statute was anomalous; it originated in the supposition that there was an irreconcilable conflict between two sections of the same federal statute, the act of 1872; and the application of the arbitrary rule of construction that in such case the subsequent section would control the prior section. It began with Hall vs. The Equator Co., wherein Judge Hallett, in the haste of *nisi prius* proceedings, without much investigation, and in the course of a few incidental remarks in passing upon a demurrer, announced the view mentioned. This view was adopted afterward in the case of Branagan vs. Dulany, by the Supreme Court of the state, reliance being placed largely, as is shown by the opinion, upon the view expressed in Hall vs. The Equator Co.; the question not being seriously contested or carefully presented by the parties or counsel. The subsequent decisions by the same Supreme Court, viz.: Lee vs. Stahl, 9 Colo., 208,

Morgenson vs. Middlesex M. & M. Co., 11 Colo., 176, Lee vs. Stahl again in 13 Colo., 174, and Coffee vs. Emigh, 15 Colo., 184, simply follow the rule stated in Branagan vs. Dulany without discussion or question, the subject not being insisted upon or specially urged upon the court's attention.

This arbitrary and inequitable rule never received the sanction generally of the bar of Colorado, and it was always regarded with a great deal of misgiving. The feeling in relation thereto, particularly after a different view was announced by the Supreme Courts of California, Montana and Arizona, was such that when the present case was brought, and the contrary view was earnestly insisted upon, even one of the district courts of Colorado, as already observed, rejected the rule as thus laid down by the Supreme Court of the state, and adopted the conclusion reached by the other tribunals just mentioned.

Afterwards, upon appeal by the present plaintiff in error to the Supreme Court of Colorado, that court itself became convinced of the error in its previous construction of the statutes involved, and after very mature deliberation and investgation, overruled the former decisions, and by an able opinion, which appears in full in the transcript, placed itself in line with the Supreme Courts heretofore mentioned; that is to say, the present attitude of the Supreme Court of Colorado, as announced in the opinion filed in the case at bar,

is that the junior cross-lode claimant is not entitled to follow his vein on its strike into any portion of the territory included within a senior conflicting location.

Counsel for plaintiff in error in this court challenges the decision under review upon two grounds, viz.:

First—That the former view of the Supreme Court of Colorado was a correct construction of the federal statutes involved; and that the present conclusion, although in harmony with the conclusion of California, Montana and Arizona is erroneous; but

Second—That even if this position be wrong, nevertheless, since the former "Colorado rule" has been in existence for upwards of fifteen years it had become a rule of property in that state, and for this reason the Supreme Court had no power or right to change its position to the injury of plaintiff in error.

We will, therefore, address ourselves to a brief discussion of these questions.

FIRST. THE JUNIOR CROSS-LODE CLAIMANT HAS NO RIGHTS WITHIN THE SENIOR CONFLICTING LOCATION.

This subject must be determined by a construction of Sections 2322 and 2336 of the United States Revised Statutes.

> Section 2322 reads, *inter alia*, "The locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode or ledge situated on the public domain * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins or lodes may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."
>
> Section 2336 reads, "When two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The language of Section 2322 is clear; but its co-existence with Section 2336 has led to a doubt as to whether it should be given full force and effect. As already suggested the former decisions of the Supreme Court of Colorado, announcing the rule that the junior locator of a cross vein is entitled to all the ore through the senior location, except at

the point of intersection of the two veins, rests solely upon two assumptions; *first*, that the above statutes are necessarily and unavoidably in conflict, and, *second*, that this being true, the subsequent section controls and modifies the earlier section, both being in the same act.

It is needless to here cite authorities upon the proposition that this arbitrary rule of construction is never invoked where it can be avoided. And this is especially true where the alleged conflict exists, as in the present case, between different provisions of an act adopted by the same legislative body at the same instant of time. If any reasonable construction can be given to the two provisions, so as to give force and effect to all parts of each, it is the imperative duty of courts to adopt such construction. The books are full of cases where courts have taken great pains to find some reasonable view upon which they can harmonize statutes seemingly in conflict, and avoid the application of this extremely technical and arbitrary rule of construction.

We confidently assert that when carefully considered, there is no necessary conflict between the two sections. Nor are we compelled to resort to any strained or unnatural construction of either, in order to avoid such conflict. In fact, it is quite as easy to give the two provisions a construction that will make them entirely harmonious, as to reach a conclusion that they are necessarily and absolutely in conflict.

Section 2322 is clear and unambiguous. It declares that the surface locator shall have the exclusive right of possession and enjoyment not only of his discovery vein but also of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of his surface boundaries extended vertically downward. The ownership thus conferred is wholly unqualified, except by the section itself in expressly limiting him to only so much of the vein on its strike as is within his parallel end lines. This absolute grant is even enlarged by giving the locator *all* of such veins (within his end lines projected,) though on their dip they may pass outside of perpendicular planes through his side lines. The statute is silent as to the *direction* of the veins mentioned. The grant is just as full and just as complete where the veins on their strike intersect or cross the discovery vein, as where they are parallel to it. The only requirement is that the top or apex of the vein, whether it extend longitudinally or transversely to the location, shall be within the surface boundaries. Moreover, the absolute character of the grant in this respect is recognized in those provisions of the law and rulings of the land office, which deal with the obtaining of government title through patents. Applications to purchase and receivers receipts both contain almost the identical language of the statute; while the patent itself declares a grant in fee simple in the same unequivocal terms.

In Del Monte M. & M. Co., vs. Last Chance M. & M. Co., 171 U. S. 55, Mr. Justice Brewer says:

> "We find from Section 2322 that he (the locator) is entitled to 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. *He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines.* Not only is he entitled to all veins, whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines."

Iron Silver M. Co. vs. Elgin M. Co., 118 U. S., 196.

King vs. Amy, etc., Co., 152 U. S., 222.

It is not contended, we believe, by any court or tribunal that the unequivocal grant above described is in any way qualified or limited, except it be possibly by said Section 2336. The following language in Section 2336 gives all the trouble:

> "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection."

This language was by the former Colorado rule, construed to refer to the crossing of veins *on their strike*; and the declaration that the prior location shall be entitled to the ore at the space of intersection, was held equivalent to a declaration that the junior location shall have all the ore in the cross vein, except the small quantity at the point of insection *of the two veins*.

In Branagan vs. Dulany, *supra*, the Supreme Court of Colorado, said:

> "The two sections quoted, appear to have been carelessly dratted, for they are certainly to some extent in conflict with each other. * * It is possible that it was not intended by the framers of this section (2322) to include cross lodes in the grant of the prior location. But if such was the intention, we see no way out of the dilemma, except by the application of the abritrary rule of construction suggested by the court in the case of Hall vs. Equator, etc., *supra*. That is, between conflicting statutes, the latest enacted will prevail, and between conflicting sections of the same statute, the latest in order of arrangement will control."

Thus was nullified an important part of the grant made by section 2322.

SECOND. INTERPRETATIONS THAT HARMONIZE THESE SECTIONS.

Three different interpretations of section 2336 have been suggested, either of which harmonizes it with section 2322, leaving the latter intact, viz:—

(1) That the first two clauses refer to the crossing of veins *both on their strike and dip;* the last clause, to the union of veins on the dip; and that in so far as they deal with intersection on the *strike*, they refer to lodes located *prior to the act of 1872*, where the lode discovered was located without surface ground, and the locator preserved his right thereto, as against a subsequent overlapping claim.

(2) That this section, throughout, deals exclusively with veins crossing or uniting *on their dip*. Under this view the section may be treated as dealing with locations made both before and after May 10, 1872.

(3) That the first two clauses deal primarily with *locations*. That is, the word "intersection" there used has reference to the locations, not to the veins. That it should be treated as if it read, "Where two or more veins intersect or cross each other, the prior locator shall take all ore within the space of *intersection of the locations* to which the crossing veins belong."

We will consider these views in the foregoing order:

(a) *The Ante-1872 Construction.*

Section 2322 deals, not only with locations made after 1872, when the act was adopted, but also with locations made prior to that time. The section starts out with the expression, "The locators of all mining locations *heretofore made* or which shall hereafter be made;" and throughout the act care is taken to protect prior locations made under local laws and miners rules and regulations. But, prior to the adoption of this act, in some localities, these laws, rules and regulations dealt solely with the vein. The miner located the vein alone. He did not obtain any particular portion of the surface. And his location of the vein he discovered gave him *no right to any other vein whatever*. Thus under Section 2322 certain conflicts of interest might arise, between senior and junior locations, viz:

Veins located at different times might intersect on their strike, and they might intersect on their dip. As to those veins located prior to 1872, where the vein discovered was the only thing taken, difficulty might arise over a crossing upon the strike, by the vein of a subsequently located overlapping claim.

On the other hand, as to veins located after 1872, as well as those located prior to that year, difficulty might arise from the crossing of veins on their dip. A third difficulty or conflict that might arise under Section 2322 is that of the union,

instead of the crossing, of veins located at different times.

To meet these very probable conflicts of interest, and do away with trouble arising therefrom, Section 2336 was wisely inserted into the law. Properly considered, it provides, 1st, that where veins located prior to 1872, in those districts, where the vein alone was taken, intersected on their strike, or where such a vein was intersected by the vein of an overlapping claim located after that date, the senior locator would take the ore at the point of intersection; the junior locator, of course, retaining the ore in his vein up to the point of intersection on either side, and also having a right of way through the space of intersection for convenience in working. 2d. Locations made under the act of 1872, as well as locations made prior to that date, where the veins intersected on their dip, the senior locator would take the ore at the space of intersection; the junior taking the ore in his vein throughout its entire depth, except at the space of intersection, and having the same right of way through this space. 3d. Where veins located either under the act of 1872 or prior thereto *united*, the older location to have the ore below the point of union.

The foregoing construction harmonizes the two sections, and it has been adopted by able courts.

"It must be remembered that the Re-

vised Statutes were not intended to impair the rights of quartz miners in cases where the locations were made before May 10, 1872, Rev. Sts., Sec. 2344. * * And in other localities there were what is known as lode locations; that is, where the lode alone was located without any surface ground. Now then, the provisions of Section 2336, can readily be construed as intending to protect the rights of such old ledge locations. But, in the second place, there are two kinds of intersections of quartz ledges. They sometimes intersect, and sometimes unite in their horizontal extension, or, as the miners call it, their 'strike.' But they may also intersect or unite on their dip; that is, they may intersect laterally in their downward course. And to such an intersection the provision of Section 2336 can be readily applied, in perfect consistency with the provisions of Section 2322."

Wilhelm vs. Silvester, 101 Cal., 358; 35 Pac., 997.

"In two instances contemplated by the statute (Sec. 2322) he (the miner) may pursue a lode beyond the limits of his claim, or the ground within the boundaries of his claim may be invaded by an adjacent proprietor. First, when the lode, having its apex within the boundaries of his claim, shall dip beyond them (but even in that event he is limited by the planes passing through the end lines of his claim); and second, when a locator shall have located a lode prior to the 10th day of May, 1872, under the mining laws then in force, and shall, as against a subsequent and over-

lapping claim, have saved his right to his lode in the manner prescribed in the act of 1872. In the latter case, the prior locator may follow his lode, upon its strike or dip, into other ground than his own. It will immediately suggest itself to a legislator that, where a miner may follow a lode outside of his boundaries, he might encounter adverse rights in an adjoining claim. His lode might intersect a lode of an adjoining claim, or it might unite with it. With this in mind, Congress enacted section 2336, whereby provision is made for the determination of what would otherwise be conflicting claims. It provides that at the space of the intersection of such lodes the oldest locator shall have the ore, and that the junior locator shall have a right of way through that space, to pursue and work his lode; that if there be a union of the two lodes, the senior locator shall take the ore at the space of intersection or union, and all of the lodes below the point of union. These two sections, so construed, completely define and make easy of ascertainment the rights of the miner."

Watervale vs. Leach, (Ariz.) 33 Pac., 418.

The two cases last above mentioned are very thoroughly and carefully considered. They were written long subsequent to the adoption of the former Colorado rule. Neither court knew at the time the opinions were framed of the view entertained by the other; yet, by processes of reasoning strikingly similar, they arrive at precisely the same conclusion. Moreover, both of them carefully review and discuss the Colorado rule and the

cases adopting it. In Watervale vs. Leach, after such careful examination and analysis of the Colorado cases, this rule is referred to in the following language:

> "The construction urged by appellees and supported by the Equator and subsequent Colorado decisions, violates the language of the statute, injects into it things not there, results in conflict in the statute among its parts, and makes infinitely more complex the old system of lode claims."

In Wilhelm vs. Silvester the same discussion is concluded with the following language:

> "The construction contended for by appellants would leave the rights of prior locators in the greatest confusion, their property interests in their claims would be indefinite, and the result would be wrongs, litigation and perhaps personal conflicts."

And the court adds:

> "But to give Section 2322 its clear and undoubted meaning is to correctly fix the rights of prior locators as we think Congress intended them to be fixed."

Mr. Lindley, in his able work on Mines and Mining, at Section 560, reviews this entire subject thoroughly, including the former Colorado rule and cases, as well as the cases above mentioned and other authorities. He shows, by a section of an official map of Cripple Creek, much more

clearly and forcibly than any language could possibly show, the absurdity, conflict, confusion and disaster to which the Colorado rule unavoidably led. And he closes his discussion with the following:

> "We are convinced that we are justified in adopting the rule as expounded by the courts of Arizona and California in preference to Hall vs. Equator, Branagan vs. Dulany, and the other Colorado cases; not because more courts have decided one way than another, but for the reason that we believe that the logic and reasoning of the former cases are in line with the rules of construction applied by the supreme court of the United States to the act of 1872 in other instances, and that the tendency of modern decisions is to recognize the controlling force of surface boundaries. Ever since the decision of the Flagstaff case, the supreme court of the United States has pursued the central idea of referring all rights in lode claims accruing under the act of 1872 to apex and exterior surface lines. We are impressed with the belief that there is no middle ground between the Colorado and Arizona-California doctrines. We therefore conclude that a subsequent locator has no right to invade the territory covered by a senior valid subsisting location, or to penetrate within vertical bounding planes drawn through its surface boundaries, except for the single purpose specified in the mining laws, and that is, in the lawful pursuit of a vein on its downword course, the apex of which is properly embraced within the junior location."

We call the court's attention, in passing, to the fact that Chief Justice Beatty, in a concurring opinion in Wilhelm vs. Silvester, *supra*, points out an additional possible conflict or difficulty that might arise under Section 2323, in the intersection of veins. He says:

> "This being so and the law allowing the locator to follow his vein on its dip outside of his side lines projecting downward vertically and within the vertical lines of an adjoining or neighboring claim, it may easily happen that the parts of two intersecting veins included within entirely distinct surface locations will intersect on their dip, either outside of *both* claims or within one or the other, according to the angle of the dip and the relation of the surface claims where the point of the apex or croppings of the veins intersect."

He then proceeds by illustration to show that it is possible for such veins, viz., those having their tops or apexes within different surface locations to intersect *on their strike* at a point outside of either of such locations, yet where they still belong to the surface locators, and says:

> "If made still further west, the line of intersection of the portions of the respective veins covered by the two locations will be wholly outside the surface lines of either location and still another case for the application of Section 2336 will arise."

And he concludes as follows:

> "Here, then, are two cases for the ap-

plication of Section 2336 without bringing it in conflict with Section 2322; and the mere possibility that such cases might sometimes arise under distinct locations, each entitled to all the rights conferred by the plain terms of Section 2322, was a sufficient reason for incorporating into the law the provisions of Section 2336."

(*b*) *The Union on the Dip Construction.*

We next consider the view that confines section 2336 to a crossing or union of veins on their dip.

By section 2322, as we have seen, the grant of the territory and of all veins apexing within the surface boundaries of locations made under the act, and perpendicular planes passed through such boundaries to the centre of the earth, is absolute, with a single exception, to wit: *Every such location is subject to invasion by the locator of a vein apexing outside, following such vein on its dip into the territory below the surface.*

There was no necessity for legislation concerning veins on their strike. It was impossible for trouble to arise from the intersection or union of veins in this way; because under the grant in Section 2322, the owner of one vein can not follow that vein on its strike, either at or below the surface into the territory covered by another valid mining location; and this is true whether such other mining location be the junior or senior one.

But, obviously, the exception from the grant

in Section 2322 above mentioned, would give rise to two questions, viz.: 1st, where the outside vein on its dip intersects and crosses a vein apexing within the location invaded; and 2d, where such ouside vein intersects an inside vein and, instead of crossing, *unites* with it. In the first case, who shall own the ore at the point of intersection of the two veins; and in the second case, who shall own the ore at and below the point of union? These questions may be very important, because veins are sometimes wide and the ore at the space of intersection alone may be worth a large sum.

To meet these difficulties Section 2336 was enacted; it was intended solely to answer these questions and prevent controversies that would otherwise necessarily flow therefrom; and it says that in both instances, the prior location shall take the ore.

Nowhere does the section use the word "strke," nowhere does it expressly mention either the crossing or union of veins *on their strike*. True, it does not expressly speak of the *crossing* or union of veins *on their "dip."* But it is dealing with a condition *created by the act itself*, viz., that part of Section 2322 which expressly allows the locator to follow his vein *on its dip* beyond his side lines—the provision under which he acquires his *extra-lateral rights*; it is to meet and do away with trouble naturally arising from this extra-lateral rights provision.

Section 2322 does not contemplate any difficulty arising from the crossing or union of *veins on their strike*. If such a thing as a cross or intersecting location were thought of, Section 2322 undoubtedly contemplated that the right to a vein on its strike shall always end at the point—the surface boundary where it enters a prior location; such has been the universal construction, barring, of course, the implication by the former rule in Colorado.

Section 2336 should be construed as a whole. The punctuation is a little unfortunate; but the use of the co-ordinate conjunction "and" at the beginning of the last clause establishes a close connection between it and the two preceding clauses.

The language of the section is peculiarly appropriate and applicable to the intersection or union of veins on their dip. Veins *do intersect* and they *do cross*, and they *do unite* on their dip. And it was necessary, as well as appropriate, that the ownership of ore at the space of intersection, and after union, should be determined by the law; it was also necessary that a right of way through the space of intersection be given to the owner of the junior vein; without this he would lose his vein beyond the point of intersection, and the clear intent of Section 2322 in confirming extra-lateral rights would be partially defeated; because he can not go upon the surface of the prior location and sink for or work his vein; the last clause of Section 2322 expressly forbids any such invasion of the surface.

Again, that the crossing and union of veins on their dip was alone contemplated, finds strong corroboration in the last clause of the section: "And where two or more veins unite, the oldest or prior location shall take the vein *below* the point of union, *including all the space of intersection.*" Here we have the same mode of expression as that employed in the first part of the section. The language is not "where two or more veins unite *on their dip;*" but "where two or more veins unite;" this might under proper circumstances mean a union either on the *strike* or on the *dip.* But, fortunately, here we have a key to the real intent, in the word "below."

It is clear that the section only deals with the *union* of veins on their dip. If the *union* of veins on their strike had been intended, Congress would have said who should own the ore *beyond* the point of union. Yet, if it was intended to have the section deal with veins on their *strike* at all, why should this limitation exist? *Why would Congress take pains to say who should own the comparatively small quantity of ore at the space of intersection when the veins cross, and yet omit to provide for the ownership in case of union?* The ownership *beyond* the *point* of union would always be more important and valuable than the ownership at the space of intersection. If the first clause of the section deals with veins on their strike, it is most astonishing that no provision is made for ownership when they *unite* on the strike; on the other hand, if the last

clause of the section is the only portion that refers to veins on their dip, it is very singular that no provision is made for the contingency of their *crossing* on the dip—that no right of way is given the junior locator, through the space of intersection.

Construing the two sections together, as we must, it seems clear that Section 2336 was intended to cover simply the crossing and union of veins on their dip. This view makes it harmonize with Section 2322, and requires no strained or unnatural inference or deduction. It recognizes a wise provision by Congress for difficulties that will necessarily arise; and does not put that body in the attitude of fighting windmills, by guarding against dangers that are already amply provided for.

(*c*) *Intersection of Locations, Construction.*

We now pass to the interpretation that the word "intersection" in Section 2336 refers to intersection of *locations* and not of veins.

In Pardee vs. Murray, 4 Mont., 279, the court incidentally employs the following language:

> "If a vein with a prior location crosses another such vein, it would not disturb the possession of the subsequent location except as to the extent of the crossed vein, and would entitle the prior location to the ore and mineral contained in the space of intersection. If, with a subsequent location, the locator would be entitled only to a right of way to the extent of his cross

vein for the purpose of working his mine and no other right."

The language of the court is a little ambiguous; but considering the fact that this language was employed with reference to Section 2336, and considering the other facts in the case, the view expressed is obviously in conflict with the former Colorado rule. It sufficiently appears that the Montana court adopted the view that the word "intersection" employed in Section 2336, refers to the intersection of locations where such locations were made under the act of 1872, and not to the intersection of veins. This construction is adopted by Mr. Morrison, in his work on Mining Rights. He says:

> "It seems to the author from the above reasoning that a cross lode takes no estate in the claim it crosses and has no right as against the crossed claim, except the mere right to drift through, leaving all ore as the property of the crossed claim."

Mor. Min. Rights, 9th Ed., p. 116.

A similar view seems to be entertained by Barringer and Adams. They say:

> "Cross lodes are, of course, those which intersect on the strike. The question naturally arises as to the definition of the phrase 'space of intersection.' The question of priority of title can arise only where two locations cross. The senior locator has already, by Rev. St., 2322, been given title to all veins, lodes and ledges, the tops or apexes of which lie inside of his surface

lines. It would follow that to preserve his rights the space of intersection given him by Rev. St., 2336, must be the intersection of the cross lode with his *claim*, that is, that part of the cross lode included within his side lines."

B. & A. on Mines and Mining, p. 472-473.

(*d*) *Conclusion of cross lode discussion.*

Thus we find that at least three different views of Section 2336 are advanced, that do away with all semblance of a conflict between it and Section 2322. The third of these views is perhaps the most difficult to maintain. We confess to a strong preference in favor of the second; it rests upon a simple and natural analysis of the statutes involved; it requires no strained or unnatural construction. But each of these views is supported by much plausibility and reason. And we confidently assert that either one of the three is amply sufficient to forbid the recognition of a conflict and the nullifying *pro tanto* of Section 2322. There is nothing to warrant or excuse application of the artificial and arbitrary rule of a repeal by implication, formerly held in Colorado.

The decision of the Supreme Court of Colorado in the present case, (The Calhoun Gold Mining Company vs. The Ajax Gold Mining Company, 27 Colo.) (See abstract of record, page 84) does not adhere to either of these constructions alone. This court says, *inter alia*:

"Our conclusion is that the provisions of Section 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause, and part of each, and in so far as Section 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of Section 2322."

Thus the learned court that rendered the judgment under consideration, adopts the first of the foregoing views in regard to Section 2336, with certain limitations upon the construction by the Supreme Courts of California and Arizona; it also adopts the third of the foregoing views without making it exclusive, as do the Supreme Court of Montana, Mr. Morrison and Barringer and Adams. That is, that the expression "space of intersection" employed in the statute refers to both the intersection of veins and the intersection of conflicting claims; according as the particular controversy involves a conflict between veins located prior

to the act of 1872, or to a conflict of locations made after the act of 1872 was adopted; in the language of the opinion the "space of intersection * * means either intersection of veins or conflicting claims, according to the facts in each particular case." This construction has some advantages over each of the first and third, just considered. It embodies the merits of both, while the reasoning and limitations avoid some of the difficulties inherent in both.

But as already suggested, and with all due deference to the learned court, we still think that the second construction hereinbefore given is the true one.

(*d*) *The Oschamp and Rico-Aspen cases.*

The assertion is sometimes thoughtlessly made that the U. S. Circuit Court of Appeals, in Oschamp vs. Crystal River M. Co., 58 Fed., 293, and in Enterprise M. Co. vs. Rico-Aspen Co., 66 Fed., 200, adopted the Colorado rule upon the subject. An examination of those opinions discloses the following facts, viz: That the question of cross lodes was not involved in either case; that it was not discussed at length by either court or counsel; that no ruling thereon was necessary to the decision; that the decision of the question would have been the purest *obitur dictum*; that the remarks of the court relied on in both cases were merely incidental and argumentative. The court

never dreamed that in either case it was committing itself to this rule. These cases constitute no precedent whatever; the court remains entirely free to deal with the subject, when properly presented, as one of first impression.

(*e*) *Land Office Decisions.*

But finally, in eagerly searching for extrinsic sanction of the former Colorado rule, counsel for appellant thinks he finds comfort in the U. S. Land Department decisions. A number of land office rulings are referred to, and counsel might, with equal consistency, have added two or three more. We will not take up the time of the court or prolong this brief by an analysis or discussion of these land office rulings. With reference to them we simply observe:

1st. That should Your Honors take the trouble to examine these rulings, you will find that they do not, in terms, refer to the Colorado cases, or anywhere affirmatively adopt the old Colorado rule; the inference indulged by counsel on the subject is mainly based upon the assumption that because in certain of these land office rulings, disconnected portions of a claim, severed by an intervening prior location, are allowed to be patented, therefore the cross lode doctrine is recognized. But a cursory consideration shows such conclusion to be a clear *non sequitor.*

2d. But secondly, land office rulings are notoriously changeable. Each succeeding administration produces a crop of changes in procedure and reversal of views previously expressed. Moreover, these rulings are never regarded by the courts as in any way binding, upon subjects like the present one that are clearly within the province of the judiciary.

Davies vs. Wiebold, 139 U. S., 507.

(*f*) *Former Colorado Rule in Conflict with Certain Federal Court Decisions.*

That rule was inconsistent with certain Federal decisions on the subject of extralateral rights. The doctrine is well established that where the apex of a vein passes in at the end line and out at the side line of a mining location, the owner of the location is the owner of such vein throughout its entire depth, between a perpendicular plane passing through the end line and a perpendicular plane parallel to the end line, intersecting the point of departure from the side line; that is to say, he is the absolute owner of the segment of the vein mentioned, including extralateral rights connected therewith. This doctrine is announced without any limitation or qualification whatever touching cross lodes. Yet such veins will often fulfill all the conditions required of a cross vein.

Speaking with reference to the decisions and doctrine above mentioned, after a careful discus-

sion of the subject, Mr. Lindley, at Section 591 of his work, says:

> "It (the doctrine) gives to the locator as much of the lode in depth as he has within his surface lines. It takes away nothing that could be lawfully appropriated by anyone else. * * It gives to the locator as much of the vein as the irregularity and imperfection of his location will permit without depriving others of any legal rights. It brings order out of chaos and certainty out of uncertainty. It does substantial justice to all concerned. * * While the rule yet awaits the authoritative sanction of the Supreme Court of the United States, when we consider the practical unanimity with which both trial and appellate courts in the mining regions have accepted it as the only proper solution of the question, we express the belief that the court of last resort will not withhold its approval."

Since the publication of Lindley's work the Supreme Court of the United States has fully affirmed the doctrine—Del Monte vs. Last Chance, *supra*.

See, also—

Last Chance vs. Tyler, 157 U. S., 683.

Tyler vs. Sweeney, 54 Fed., 284.

Last Chance vs. Tyler (re-trial), 61 Fed., 557.

Del Monte vs. N. Y., 66 Fed., 212.

Con. Wyo. Co. vs. Champion, 63 Fed., 540.

Tyler vs. Last Chance, 71 Fed., 848.

But this universally conceded proposition, to wit, that a mining patent or location confers upon the owner, ownership of all veins, whose apexes pass through, intersecting an end line and a side line, together with extralateral rights in connection therewith, is inconsistent with the theory that such a vein, when it happens to intersect and cross, as it frequently does, a lode upon which the location is made, may be covered and held by a junior location, except at the point where the two veins intersect. There would be a manifest and irreconcilable inconsistency in holding that the senior location or patentee *owns such a vein within his territory and is entitled to follow it throughout its entire depth into other ground, and at the same time holding that, nevertheless, it is subject to location as a cross lode, and may at any time be taken from him by means of a cross junior lode location.* It is impossible to reconcile the rejected Colorado rule with the language quoted in the fore part of this brief, used by Judge Brewer in Del Monte vs. Last Chance; a case where the vein considered, passed through an end and a side line.

No court in Colorado has, we believe, ever applied the Colorado doctrine of cross lodes to such a vein, where it intersected the vein of a prior location; in each of the foregoing Colorado cases, the cross-vein intersected both side lines of the senior location. But the Colorado rule is no less inconsistent with the reasoning and conclusion of the Federal Courts in cases like Last Chance vs.

Tyler, *supra*, where the right of the locator to veins crossing both side lines is clearly recognized, and for certain purposes the end lines are declared to be side lines. As strong a case as any, illustrating this last inconsistency, is Del Monte vs. Last Chance, *supra*.

(g) *Rejected Colorado Rule Conflicts with Patents.*

Before closing upon this branch of the case, we desire to call the court's attention specifically to the patents in the record. The record shows that the patents issued to defendant in error for the Apex, Monarch and Mammoth Pearl claims, include all of the Victor Consolidated alleged cross-vein, passing through these claims; that is, the patents expressly convey to defendant in error the territory including the 600 or 700 feet of the alleged cross-vein, together with "all veins, lodes or ledges" found therein, "throughout their entire depth," etc. On the other hand, the record shows that the Victor Consolidated patent simply conveys two little triangular pieces, one at each end, over one thousand feet apart, and aggregating probably not over an acre of ground. (See map in abstract.) This patent expressly excepts all that portion of the intervening territory covered by defendant in error's patents, together with all lodes, veins or ledges having their tops or apexes therein. There can be no doubt as to the identity of the exclusion so made, because the claims of defendant in error are expressly named and described.

Thus we find that the government of the United States, by its patents, has expressly conveyed to defendant in error title in fee to the included portion of the Victor Consolidated alleged cross lode; and that it has in the same solemn manner expressly excepted from and carved out of the grant to plaintiff in error such cross lode to that extent.

Now it would seem that the patents themselves ought to be decisive of this whole question; we venture to say that under any other circumstances they would be. In all the range of jurisprudence we do not believe there is another instance where the intention of the government of the United States, or of an individual in making two grants, expressed in this way, has ever been seriously questioned. The effect of the rule rejected is to qualify both of these patents; that is to say, by this rule there is arbitrarily, and without any warrant of law, as we maintain, carved out of our patents that which may be the most valuable thing covered by those patents; while on the other hand, this rule legislates, by judicial decision, back into plaintiff in errors patent a vein which the grantor (the United States) in express terms excluded therefrom.

We submit that this is a very strong consideration in the premises; and that if there were any doubt as to the proper construction of Sections 2322 and 2336, the two grants by the government

of the United States under Section 2322, would be decisive of this case.

The foregoing discussion is inadequate and does not satisfactorily, to us, present the subject. It might be considerably prolonged; but we feel confident that enough has been said to establish beyond question the error in the rejected rule.

SECOND—STARE DECISIS AND RULE OF PROPERTY.

But it is urged that this question was *stare decisis*, and that the rejected construction had become a rule of property in Colorado. As a consequence, counsel insists that the Supreme Court of Colorado ought to have adhered to the former construction, even though it was erroneous. We hardly think this court will give serious consideration to these suggestions; we will therefore not discuss them at any considerable length.

(*a*) *As to the doctrine of stare decisis*:

> "If a prior decision is clearly erroneous, whether from a mistaken application of the law or through a misapplication of the law to the facts, and especially if it is injurious or unjust in its operation and while no injurious results would be likely to flow from a reversal of it, it is not only a departure from the rule in *stare decisis*, but it is the imperative duty of the court to overrule it."
>
> Black on Interpretation of Laws, p. 403.

"Again, it (the doctrine of *stare decisis*) does not apply to a case where it can be shown that the law has been *misunderstood or misapplied*, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such case it is the duty of courts to re-examine the question."

Rumsey vs. N. Y., &c., Co., 133 N. Y., 79.
Black. 403.

"Of course, I am not saying that we must consecrate the mere blunders of of those who went before us and stumble every time we come to a place where they have stumbled. A *palpable mistake, violating justice, reason and law*, must be corrected, no matter by whom it may have been made."

McDowell vs. Oyer, 21 Pa. St., 417.

"If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there would be no possible correction of abuses, because the fact of their existence would render them above the law."

2 Bouv. Dict., 445.

Chancellor Kent, commenting on the rule of *stare decisis*, said that more than a thousand cases could be pointed out in England and America, which had been overruled, doubted or limited in their application.

1 Kents Commentaries, (12th Ed.) 543, *477.

Paul vs. Davis, 100 Ind., 426.

While by reference to Biglow's Overruled Cases, it will be seen that down to the year 1887, the number of such cases, reached upwards of 27,000.

(*b*) *Decision of highest court necessary to establish a rule of property.*

A decision, or a series of decisions, cannot be said to have become a rule of property, unless they are pronounced *by the highest judicial tribunal that can pass upon the subject*; that is to say, the construction of a state constitutional or statutory provision, relating to property, by a *nisi prius* state court, no matter how often repeated, nor how long adhered to, does not become a rule of property. Until the Supreme Court of the state has passed upon the subject, parties are not justified in assuming that the view has become a part of the established law. If this were not so, we might have as many different and conflicting rules of property as there are different *nisi prius* courts in the state.

And so it is with a federal statute, such as the one under consideration. A construction given it is not a rule of property until the highest court that can pass upon it has spoken; that is to say, *until the Supreme Court of the United States has investigated this particular subject*, and has adopted the rejected rule, this rule is not, under the authorities, to be treated as a rule of property even in Colorado. If this were

not so, we might have forty-five different rules of property deduced from the same statute, if the courts of the forty-five different states should happen to take as many different views thereof.

Whenever a person, in dealing with real estate, relies upon a particular construction of a given statute, he is chargedwith notice beforehand that this construction is subject to change or modification whenever the question reaches the highest court of the state, if it be a legislative act, or the Supreme Court of the United States, if it be an act of congress.

> "Where the decision of any tribunal is subject to appeal to a higher court, such decision is not effected by the doctrine of *stare decisis*, until passed upon by the highest tribunal of last resort.
>
> 23 A. & E. Enc., 21.

And until then, of course, it does not become a rule of property.

(*c*) *If an erroneous rule of property, thus established, works more harm than its reversal would, it will be discarded.*

But even where the highest court has announced a rule relating to property, which rule is found to be erroneous, unless more hardship and injury would result from its reversal than from its maintenance, the court will promptly recall the rule and correct the error. Speaking upon this subject Mr. Black, in his work on the Interpreta-

tion of Laws, at Section 151, says that a decision which has become a rule of property should be adhered to "unless it is seen that the erroneous rule itself works more harm than could result from its reversal."

Authorities might be multiplied indefinitely upon this proposition, but they are unnecessary.

The case at bar, we maintain, comes clearly and unquestionably within this exception. We have invited attention to the conflict and confusion resulting from the former Colorado rule, a little of which conflict and confusion is so forcibly illustrated by Mr. Lindley in the Cripple Creek sectional diagram heretofore mentioned. It is true, this rule has existed in that state for a number of years, and it is also true, as contended, that relying upon it many junior locations have been made across senior locations.

But, in the first place, these junior locators are usually entitled to but little consideration from the standpoint of justice; generally, as in the case at bar, they have taken advantage of the labor and industry and discoveries of the prior locator and are seeking to take from him the legitimate fruits of his efforts.

Again, these conflicting locations have lead and are leading to almost endless trouble; they breed a crop of cases among the most perplexing the courts are called upon to try; they unavoidably

lead to personal controversy, sometimes resulting in bloodshed; and it is safe to say that no other subject in connection with mining law is more prolific of perjury and its accompanying wrongs and injuries than this.

So that, even as to the cross-locations heretofore made, the result in the long run, will be more disastrous to the vast majority of the parties concerned, including the cross-lode locators themselves, than will be the abrogation of the rule.

But, numerous as are the locations already made, the number is insignificant when compared to those that will be hereafter made. In Colorado mining is as yet in its infancy. But a small portion of the state has been explored or developed. In all probability, within the next forty or fifty years, a score of new Cripple Creeks, Leadvilles, Central Cities, and Aspens will appear; and when we consider the disastrous results in the future to miners, to courts and to all others concerned, whether it be through the ownership of the claims or through the administration of the law, of a continuation of the rejected rule, all doubt as to the correctness, in this regard, of the decision now under consideration disappears.

When this Honorable Court decides the question, its decision will, of course, apply to and be controlling in Colorado, as well as in all other parts of the union. It will apply to all cross vein locations whether made before or after its announce-

ment. One construction of the statute involved will not be given for Colorado, and another for the other mining states. And the Supreme Court of Colorado has shown wisdom in discarding the erroneous construction first given. Every day that interpretation was allowed to stand but magnified the injurious results naturally flowing from its existence and rendered more difficult and embarassing its ultimate abrogation.

JUNIOR TUNNEL VEINS.

FIRST. A JUNIOR TUNNEL HAS NO RIGHT TO BLIND VEINS APEXING WITHIN A SENIOR LODE LOCATION.

We come now to the second question of law. This question is also purely one of statutory construction; it has never previously been decided, so far as we are aware, by any appellate court in the United States. It is, therefore, a question of first impression; and the discussion involved is wholly unembarrassed by any adverse ruling.

The court will remember that the Ithaca tunnel site of plaintiff in error was located and the Ithaca tunnel was begun *four years* subsequent to the location of plaintiff's lode claims, over *two years* after application for patents therefor, over *seven months and five months* respectively after issue of receivers' receipts, *four months* after the Apex patent itself had issued, and but *eighteen days* be-

fore the Monarch and Mammoth Pearl patent issued.

Plaintiff in error contends that notwithstanding these facts the Ithaca tunnel owner is entitled to hold all of the blind veins cut therein *within appellee's patented ground*. In other words, the contention is that no matter how many years a lode claim may have been patented, and no matter how many thousands of dollars may have been expended by the owner thereof in developing the same, any person may locate a tunnel site and take from him all veins apexing within his claim not appearing on the surface, and which at the time of the tunnel site location had not been actually *found*. If this contention be correct, I can today go to Cripple Creek, make a tunnel site location and hold every vein within the Independence or Portland or Strong properties, which does not appear on the surface and which the owners at this time have not actually found.

This proposition is so preposterous, so audacious and so repugnant to justice and fairness that its mere statement carries with it a negative answer. Only by the clearest and most satisfactory *statutory declaration* ought such a contention to be maintained. Hence it is that counsel, in order to support his position, is driven to the necessity of insisting that Section 2323 does not confer this extraordinary right. If this provision *does* sustain him he is no where sustained. It reads:

"Where a tunnel is run for the development of a vein or lode or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

In discussing the question proposed, it will not do to single out Section 2323 and limit ourselves solely to it, ignoring the rest of the act of which it forms a part. This section must be construed in connection with other general provisions of the act, especially with Section 2322, immediately preceeding; so interpreted, its meaning is plain.

Section 2322 is the key to the entire act, as to the extent of the grant of veins. Around it in this respect the remaining provisions cluster. In discussing the subject of cross lodes we have pointed out the comprehensive and sweeping character of this section.

We recall the fact that this section not only insures to the locator the discovery vein upon which

his location is based, but also all other "veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside" of his surface boundaries extended downward vertically; and that the grant of these *other veins* is just as full and complete as the grant of the discovery vein, is the universal view adopted by all the decisions, both Federal and State. Neither does the statute nor do the decisions make any distinction with reference to the point where such veins must apex; that is whether their apexes be upon the surface or whether they be 50 or 500 feet below the surface, the vein is covered provided such apex be within the surface boundary lines projected perpendicularly downward. We recall to the courts recollection the forcible language of Judge Brewer in 171 U. S., 55, referring to Section 2322:

> "He (the locator) is not limited to only those veins which extend from one end line to another or from one side line to another or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines."

It follows, therefore, that counsel's contention to the effect that a junior tunnel owner may take away from the senior lode location a portion of the veins apexing therein, *necessarily recognizes or presupposes a conflict between Section 2323 and Section 2322.* And he boldly asserts that such conflict exists. He carves out of the grant made by Section

2322 that which may ultimately prove to be by far the most valuable part thereof.

Here again he encounters the rule of construction that a repeal by implication will not be tolerated, unless no reasonable interpretation can be given which will harmonize the statutory provisions and give full effect to both; and we repeat that this rule is applied with greater emphasis in cases where, like the present, the alleged conflict is between two sections of the same legislative act. But, as we shall presently see, no repeal by implication exists.

Section 2323 shows upon its face, the intention of Congress *to apply to tunnel rights the principle of priority which pervades all of our mining laws.* If the tunnel site is located and the tunnel begun *before* the conflicting surface lode location is made, then, but not otherwise, the right to blind veins attaches.

Counsel reads the section as if stopped with the first semicolon. In reaching his conclusion he ignores and he must ignore, the clause following this semi-colon. It is needless to say that such is not the way to construe a statutory provision. In order to properly comprehend the intent of the law makers, all clauses of the section must be read together. The first clause declares that the tunnel owner shall have the right to possession of all blind veins discovered therein; and if this clause stood alone, there might be a possible chance for counsel

to claim that this section conflicts with the preceding one. But, unfortunately for his contention, and settling it adversely to him beyond a peradventure, the second clause of the section immediately following the semi-colon reads, "and locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties *after the commencement of the tunnel*, and while the same is being prosecuted with reasonable diligence, shall be invalid." This second clause is connected with the preceding one by the co-ordinate conjunction "and," and a comma would have been a more accurate punctuation point between; but this makes no difference. The declaration that surface locations made on the line of the tunnel *after* its commencement shall be invalid, clearly indicates the intention of Congress in the premises. If Congress had intended to have the provision apply to surface locations made *before* the tunnel was begun, no such misleading language would have been employed; in fact, the whole of this second clause would in such case be entirely superfluous. Had Congress inserted a provision declaring that this section "shall not give to the tunnel owner any right whatever to blind veins in surface locations made prior to the commencement of the tunnel," its meaning would not have been a particle clearer.

The foregoing interpretation gives full force and effect to Section 2323, and makes it entirely harmonious with Section 2322. It obviates all of

the wrong and injustice and paradoxical results flowing from counsel's position; it is perfectly reasonable and natural. When the prospector makes his conflicting surface location, he is aware of the previous tunnel location, of the commencement of the tunnel, and of the vested rights which the statute gives to the tunnel locator; hence, he takes his chance in regard to blind veins, and has no cause of complaint, if afterwards such veins are cut in the tunnel; but he is not bound to anticipate the subsequent location of a tunnel site and as to such subsequent tunnel, he takes no such hazard.

SECOND—THE CASES NOT INCONSISTENT WITH THE FOREGOING VIEW.

Enterprise M. Co. vs. Rico-Aspen M. Co., 66 Fed., 200, affirmed in 167 U. S., 108, and Ellet vs. Campbell, 18 Colo., 510, affirmed in 167 U. S., 116, have been referred to by a few journalists and lawyers, including counsel for plaintiff in error as supporting the construction here contended for. But a single observation touching these cases shows this claim to be groundless. In the Rico-Aspen case, the court says:

> "The tunnel was, however, located some *8 or 9 months before* the discovery and location of the Vestal claim."

And the opening sentence of the circuit court of appeal's opinion contains the same statement. While in Ellet-Campbell case it appears that the conflicting surface location was made more than

14 years after the location of the tunnel site and commencement of the tunnel, and more than *11 years after* the vein in controversy had been actually cut in the tunnel; in Ellet vs. Campbell, as stated in 18th Colorado, the proposition denied was that the tunnel location although perfect and kept in full force, "is of no avail to protect a prior discovery in the tunnel against a *junior surface location of the same lode.*"

These cases, therefore, could not possibly decide the question before us. They only go to the extent of recognizing ownership by the tunnel locator of blind veins, where the conflicting surface location was made eight months and fourteen years respectively, after the location of the tunnel site and commencement of the tunnel.

The only thing in either opinion that bears the slightest semblance of a justification of counsel's contention, is the declaration by this Honorable Court in the Rico-Aspen case that "veins or lodes discovered on the surface or exposed by shafts from the surface, must be "*found*" before any right to them vests."

Now, in the *first* place, it will be remembered that the Rico-Aspen case did not involve the right of a tunnel locator to veins cut in a *senior surface location.* And therefore, if the decision did covey such a condition, to that extent it would be purely *obiter dictum.* But, *secondly*, it is only by implica-

tion that this language can be made to refer to a case like the one at bar. That is to say, it is only by assuming that this Honorable Court in effect declared that when a surface lode location is made under Section 2322, the locator acquires no right to anything but the surface ground *and the lode or lodes he has actually discovered.* But the expression quoted is simply and solely used by way of illustration and argument; in emphasizing the clear proposition that a tunnel owner has a vested interest in veins cut in surface locations *made after* the tunnel is begun, which interest dates from the commencement of the tunnel, the court inadvertently made the broad statement quoted.

True it is that Section 2320 of the statute declares that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located;" but here again we must remember the rule that all germane provisions of the statute are to be construed together, and it follows that this declaration in Section 2320 is to be taken in conjunction with the declaration in Section 2322, that a locator shall not only have the vein upon which he locates, but also all other "veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside such surface boundaries extended downward vertically." So construed, the intention is clear. A valid location cannot be made until a vein of mineral is actually discovered; but when such a vein is discovered, the location made thereon, 1,500 by 300 feet, includes

all other veins apexing within such area; and the locator obtains just as complete and absolute a title to the undiscovered veins apexing within his ground as he does to his discovery vein.

The expression used, as we have observed by way of argument, that no right vests in a vein through a surface lode location until it is "found," is not strictly accurate. Rights to veins not "found" are being every day acquired through valid surface locations, and are every day recognized by the Government of the United States through solemn grants in patents coveying title in fee simple thereto.

When Lindley's work was published, the Rico-Aspen case had not been decided by this court. The learned author takes issue with the Circuit Court of Appeals, 66 Federal, contending that that decision is too broad in favor of tunnel locators. Sections 483 to 491, inclusive. In our judgment, however, Mr. Lindley's reasoning does not overcome the logic of that opinion or of the supreme court opinion after rendered, upon the points actually decided. But the difference of opinion between Lindley and the two courts in no manner affects our discussion in this case, because, as already shown, both decisions are in perfect harmony with the view that the junior tunnel takes nothing in a senior lode location.

In Stratton vs. Gold Sovereign M. & T. Mills, the facts were that a lode location was made Sept. 5, 1891, tunnel location, March 30, 1892, lode patent

issued April 13, 1895. So the tunnel was six months junior to the conflicting lode location. Application was made in the Federal Court of the District of Colorado by the lode claimant for an injunction to prevent the tunnel owner from running his tunnel into the lode claim, one of the purposes of the tunnel owner in so doing being to assert title to veins therein, crossing the line of the tunnel. Judge Hallett promptly granted the injunction, saying, *inter alia:*

> "When a location has been properly made in either class, and so long as it shall be fully maintained by use and enjoyment or by patent, the territory embraced in such location is not subject to adverse location by a claimant of the same class or *any other class.* * * Assuming the John A. Logan location to have been well made in the month of September, 1891, and maintained thereafter, the grantors of respondents could not afterward locate the same territory *by a tunnel or in any other way.*"

It seems that counsel in that case, like counsel here, argued that the Rico-Aspen case in some way affected the question. Judge Hallett disposes of this argument in the following terse and forcible manner:

> "The Rico-Aspen case reported in 167 U. S., was the subject of much comment at the bar, but it does not appear to have any bearing upon any question presented in this record."

The foregoing views and authorities effectu-

ally dispose of the tunnel theory urged by plaintiff in error: and we confidently reassert in conclusion upon this subject that a junior tunnel site location and tunnel take no vested or other interest in the blind leads apexing within a valid senior conflicting lode location.

The Supreme Court of Colorado, in the opinion now under review, after carefully and ably pointing out the difficulties and inconsistencies involved in the construction of Section 2323, now urged by plaintiff in error, and which was also insisted upon before that court, *inter alia* upon this subject, employs the following language with reference to said section:

> "It provides how inchoate rights to blind veins may be initiated; how they may become absolute; but nowhere does it in terms, either expressly or impliedly, declare that for these purposes it (the tunnel) may be projected into or across prior valid locations. To give it the interpretation that it does, is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the sections preceding, and overthrows the doctrine of priority the foundation upon which mining rights rest. It does not provide that under a location for tunnel site purposes a right is granted to search for mineral in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain."

Thus the Supreme Court of Colorado unan-

swerably disposes of the question immediately under consideration. And in so doing it: *first*, avoids all inconsistency between the two sections construed and harmonizes them fully throughout; and, *second*, it re-recognizes and upholds in this connection the fundamental principle of priority of location that has thus far characterized all legislation and judicial decision in relation to mining rights.

V.

TUNNEL RIGHT OF WAY.

FIRST. A JUNIOR TUNNEL HAS NO RIGHT OF WAY THROUGH A SENIOR PATENTED LODE LOCATION.

The third proposition of law submitted is whether the Ithaca tunnel, even though it possesses no interest in any veins apexing in the patented ground of defendant in error, is, nevertheless, entitled to a right of way through that ground. Both the trial court and the Supreme Court of Colorado answered this question in the negative, and we maintain that their conclusion is right. Incidentally, in his opinion the trial judge employed the following language:

> "The law of ownership of land is elementary, and is based on reasonable grounds, and applies to a grant from the government for a mineral patent as much as for an agricultural patent. It has the force of a common law grant. It is a free hold."

The State Supreme Court discussing this sub-

ject in the present case, also *inter alia*, expressed itself as follows:

> "In this respect, it (state legislation) has been clearly superseded by the Act of Congress, so that if appellant is entitled to the right (of way) claimed, it must attach by virtue of some provision of this act. * * Such rights as are conferred by a valid prior location, so long as it remains in full force and effect, are preserved from invasion, and cannot be infringed upon or impaired by subsequent locations. * * And are as fully protected under the rules of the common law as any other classes of real estate. Under the statutes the subsequent locator has no right to penetrate a senior valid and subsisting location underneath its surface boundaries extended downward vertically except for the purposes specified in the mining law. * * These exceptions do not include a right to drive a tunnel through such a location for the purposes of discovery. * * Our construction of Section 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend the tunnel through previous valid subsisting locations."

Referring to this subject, Mr. Lindley, at Section 531 of his work, says:

> "After such (a mining lode) location has once been completed, the estate of its owner cannot be subjected to burdens except for public use; or, if sanctioned by the state constitution, for private use upon condemnation proceedings."

But it is argued that prior to the acts of Con-

gress it was the custom among miners to assume easements, including the running of tunnels through another's location. Therefore, that such custom or usage ought still to be recognized. But the fact is that the property then belonged to the government of the United States; miners exercised the license of going upon the public domain and extracting mineral therefrom; but these acts were all trespasses so far as the United States was concerned, and could at any moment have been stopped by the government as the paramount owner. So that all miners were simply trespassers upon another's property, and a custom existing under such circumstances could not he binding under the circumstances here presented.

The whole subject is now governed and regulated by the act of 1872. This act expressly authorizes a miner to initiate a title by location and provides for ripening, by patent, the rights thus acquired, into a title in fee simple. And when the miner has complied with the law by making a valid location, he has become the owner of the property and remains such owner unless it be forfeited, with all the advantages, so far as title is concerned, accruing under his patent when subsequently issued. The whole situation is thus radically changed. Mr. Lindley deals ably with the matter in Sec. 491, p. 603, of his work, as follows:

> "We are aware that it is contended that any mining proprietor has a right to tunnel underneath his neighbor, and that

this class of easements is granted by local rules and customs independent of questions of priority. Whatever may have been the rule sanctioned by local regulations during the period when all engaged in mining on the public lands were technically trespassers, since a perfected mining claim has been given the dignity of an estate of freehold no such right exists. Easements and rights of way may be acquired over the public domain, but after it passes into private ownership no such rights can be asserted, except for public purposes or for limited private uses, if provided for by the State Constitution. In such cases, unless consent is obtained, condemnation proceedings are necessary."

In Amador vs. De Witt, 73 Cal., 482, the right of way for a tunnel through another's location, even by means of condemnation proceedings, was denied.

In People *ex rel*, etc., vs. District Court, 11 Colo., 147, it was held that the right to construct a tramway over another's mining claim, for the purpose of transporting ore, could not be obtained without the owners' consent, even by condemnation proceedings.

In Stratton vs. Gold S. M. & T. Co., *supra*, the right of way for a junior tunnel was, as we have already seen, denied, and the progress of the tunnel was stopped by injunction, the court expressly declaring, in addition to the language quoted above, that "the territory covered by such location has been severed from the public domain and has become private property, which is no longer open to a new

appropriation;" the tunnel claimant there, as here, asserting a right to blind veins within the lode location.

It cannot be said that the U. S. statute of 1872 enlarges this common law principle relating to realty. Sec. 2338, U. S. Rev. Sts., does not have this effect; it says:

> "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage and other necessary means to their complete development, and those conditions shall be fully expressed in the patent."

This section permits the legislature to enact legislation with reference to easements. And we will next consider the position in this regard, assumed by counsel at pages 27 and 28 of his brief filed in this court.

(*a*) *As to Colorado statute granting a tunnel right of way.*

We first observe that said Section 2338 only authorizes local state legislation where the "rules" so adopted relate to *the working of mines.* There is here no express authority for state legislation where the easement sought is for "*the discovery of mines.*"

But counsel argues that, contemplated by said Sec. 2338, and covering this subject, is Sec. 3141, Mills Ann. Sts., of Colorado, which reads:

> "Any person or persons engaged in

> working a tunnel within the provisions of this chapter, shall be entitled to 250 feet each way from said tunnel on each lode so discovered. * * * And persons working said tunnel shall have the right of way through all lodes which may lie in its course.

He says that here is full and plenary authority for running the Ithaca tunnel through the ground of defendant in error. Let us see. All that portion of this section down to the last clause above quoted is declared to be repealed by the congressional provisions under consideration, in Ellet vs. Campbell, 18 Colo., *supra*. In the Rico-Aspen case, *supra*, Judge Brewer, with reference thereto, employs this language: "If that section has not been in terms repealed by the legislature of Colorado, it was superseded by legislation of congress as found in the revised statutes." The learned judge speaks of the *whole* section; he does not except from the repealing or superseding effect, any portion of it. But we may concede for the purposes of the argument that since Judge Brewer was discussing only the *length* of the vein taken, and since the question of a right of way for tunnels was not expressly before the court, his language is not decisive. We may also concede for the purposes of the argument that where a statute is only partially inconsistent with a subsequent provision, only so much of the statute is repealed as is thus conflicting.

The Supreme Court of Colorado, in the opin-

ion now under review, holds that as to tunnels run for the discovery of mineral, the Colorado statute "has been clearly superseded by the act of congress." Also that there is no provision in the latter act conferring such authority. As the Ithaca tunnel was run for this avowed purpose, the contention in the present case is thus effectually disposed of.

But there is another complete answer to the present contention by plaintiff in error, viz:

(*b*) *This local right of way provision referred to was undoubtedly repealed by the adoption of the State Constitution.*

When the Federal Statute, Sec. 2338, *supra*, says that a state legislature may provide rules involving easements for working mines, it does not override the State Constitution; it means that such statute a may be adopted by the legislature, provided it is not forbidden by the State Constitution.

Section 3141, Colorado statutes, above mentioned, was adopted by the territorial legislature in 1861; it was in existence prior to and at the time of the adoption of the State Constitution. The latter instrument declares, Schedule, Sec. 1, that "all laws in force at the adoption of this constitution shall *so far as not inconsistent therewith* remain of the same force," etc. So that only laws, existing prior to the adoption of the constitution, that are consistent with its provisions, remain in force. All laws inconsistent with the provisions of

the constitution were repealed. Sec. 14, Art. 2, of that instrument, reads: "That private property shall not be taken for private use, unless by consent of the owner, except for private ways of necessity, reservoirs, drains, flumes or ditches, on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes." And Sec. 15 of the same article reads: "That private property shall not be taken or damaged for public or private use without just compensation," etc; it also provides for the determination of such compensation through eminent domain statutes, prior to the taking or damaging.

No doubt can exist that a mining claim, held under a valid location or patent, is private property. Nor can any doubt exist that running a tunnel into or through such property by one not the owner, is a taking or damaging for private use, within the meaning of these constitutional provisions. It is not necessary to add that Congress has not the power to make valid a state statute that is in conflict with the State Constitution.

The Supreme Court of Colorado settled these questions in People *ex rel.* vs. District Court, *supra*. That opinion is decisive of the present discussion throughout. It holds, that a tramway for transporting ore from the owner's mine to his mill, is not a "private way of necessity;" that such a tramway is "private use;" that a statute—Sec. 2407, G. S., of Colorado, expressly giving the easement for such a tramway is in conflict with Sections 14 and

15, Art. 2, State Constitution; that the adoption of the constitution affected a repeal of the statute *pro tanto*, it having previously existed; and finally that Congress had not the power by Section 2338, *supra*, to make valid a legislative act void because inconsistent with the State Consitution. *Inter alia*, the opinion says:

> "To this extent, therefore, the statute in question (Sec. 2407, G. S.) is inconsistent with the Constitution, and must be held to have been repealed by it. Only the territorial laws in force not inconsistent with it continued as laws of the state." * *
>
> "The Constitution recognizes the right to appropriate private property for private ways of necessity, but not for the construction upon and over it of private railroads."

If a tramway for transporting ore is not a "private way of necessity," most assuredly a tunnel for the discovery of veins cannot be one; and certainly such a tunnel is not a "reservoir," a "drain," a "flume" or a "ditch." Moreover, the tunnel is as much a "private use" as is the tramway.

In People, *ex rel*, vs. District Court, the tramway owner sought to obtain his license to cross the intervening claim through condemnation proceedings instituted in due form of law. But plaintiff in error in the case at bar committed a wilful trespass; private property was here taken and damaged, not only without resort to "due processes of law," but

when *there is not and cannot constitutionally be any such due process of law.*

The case of Amandor Co. vs. Dewitt, 73 Cal., *supra*, is, if possible, even more analogous to the case under consideration, because there a tunnel, instead of a tramway, was involved. Though in that case the tunnel was for transporting ores, and not, as here, for the discovery of mines. There, also, the condemnation statute was invoked. But the right was as emphatically denied, as in People vs. District Court.

See also Lindley, Secs. 248 to 264, inclusive.

Therefore, we say that a statute authorizing tunnels to be run through private property without the owner's consent, is expressly forbidden by the state constitution of Colorado; hence, if there be no repeal of the clause relied on in said Section 3141, *supra*, by state or congressional legislation, this provision unquestionably fell with the adoption of the state constitution.

VI.

DISCOVERY OF MINERAL.

We now proceed to consider the fourth and last question propounded in this case:

Should plaintiff in error have been allowed at the trial to introduce evidence challenging the dis-

covery of mineral in two of the patented claims belonging to defendant in error prior to the location of its tunnel site?

(*a*) *This is an attempt to attack the patent.*

Your Honors will remember that the Ithaca tunnel site location was made seven months after the receiver's receipt had issued to defendant in error for the Monarch and Mammoth Pearl, both claims being covered by one patent; also that this tunnel location was made just *eighteen days* before the issue of the patent itself. The court will also bear in mind that the present suit was brought to enjoin plaintiff in error from further trespassing with its tunnel upon the ground of defendant in error, from taking out ore therein and for damages already inflicted. *It is not a suit directly attacking the patent for fraud.* Such a suit could only be instituted by permission of the Attorney General of the United States, and ought to be in the name of the United States. Hence, this offer of evidence amounts to *a collateral attack upon the patent.*

Counsel for plaintiff in error denies that there was in this offer of evidence any attempt to attack the validity of the patent. In support of this assertion he ingeniously argues that,

> "The patent relates back to the discovery of ore within the limits of the location, and if there was no discovery of ore within the limits of the claims of defendant in error

> at the time of the location of the Ithaca tunnel site, then the patent does not relate back to the time prior to the location of the tunnel."

Counsel's position seems to be that since he does not desire to overthrow the patent entirely, but simply aims to have it take effect at a date subsequent to the location of his tunnel site, he is not attacking the patent. A patent is, except when directly challenged, conclusive evidence of the performance of all acts, including the discovery of mineral prerequisite to its issuance. And any attempt to postpone the date when it would ordinarily take effect, so as to give precedence to a subsequent location, is an attack upon the patent itself. Counsel is wrong in assuming that a patent takes effect from the date of the discovery of mineral.

> "A mining patent is conclusive proof of discovery and location according to law. Such patent takes effect by relation as of the date of location."
>
> Clark M. L. Digest, Par. 263, p. 417, citing
> Last Chance vs. Tyler, 15 U. S. Appls. 456.
> N. P. R. R. vs. Cannon, 54 Fed., 259.
> See also Lindley, Sec. 783.

If there can be any criticism of the above proposition so stated by Mr. Clarke, that the patent is conclusive of the discovery of mineral at the date of location of a mining claim, there can be no

possible question but that it is absolutely conclusive of this fact *from the date of application to the land office for patent.* It might possibly be contended that the land officers do not necessarily investigate the existence of mineral at the date of the original location; but, be that as it may, they do unquestionably *find as a fact*, upon the evidence presented, that at the date of the application for patent, mineral in place had been discovered.

It follows therefore that plaintiff in error has in no event any such intervening right as would enable it to be heard, even if the patent were held only to relate back to the *date of entry*; its tunnel site location having been made, as above suggested, seven months after that date.

(*b*) *Patents to mining claims not subject to collateral attack.*

But not only is this an attempt to attack the patent; it possesses a further and fatal infirmity n being a *collateral* attack.

If the Land Department has jurisdiction, that is to say, if the land itself is subject to sale, the patent can only be attacked upon the ground of fraud, and such attack can only be made by a direct suit in equity in the name of the United States (the grantor) or under its direction. And it matters not even that the proceeding be a suit in equity, the attack is none the less collateral if it be not brought by the United States or under its direc-

tion for the *specific purpose of annulling and vacating the patent.* These principles are so well known and so fully understood by this court, that we shall not dwell upon them at any considerable length.

> "A patent to land over which the Land Department has the power of disposition, is impervious to collateral attack."
>
> U. S. vs. W. S. R. R. R., 15 C. C. A., 96.
> N. P. R. R. vs. Cannon, 54 Fed., 359-262.
> Mining Co. vs. Cambell, 135 U. S., 286.
> Smelting Co. vs. Steel, 106 U. S., 451.
> U. S. vs. White, 17 Fed., 564.
> U. S. vs. Iron Silver Co., 128 U. S., 73.
> Lee vs. Johnson, 116 U. S., 48.

And the patent itself is, in a collateral attack, conclusive evidence of the performance of all steps and compliance with all requirements preliminary to its issue, *including the discovery of mineral.*

"A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken."

Lindley, Sec. 777; citing:

> Davis vs. Wiebold, 139 U. S., 507.
> U. S. vs. Iron Silver, 128 U. S., 673.
> Kahn vs. O. Tel. Co., 2 Utah, 174.
> Poire vs. Wells, 6 Colo., 406.
> Justice M. Co. vs. Lee, 21 Colo., 260.
> Mont. Cent. R. R. vs. Migeon, 68 Fed., 811.
> Park River vs. Carroll, 66 Fed., 47, and other cases.

"In favor of the validity and integrity of such an instrument (a patent) we must presume that all antecedent steps necessary to its issue have been taken."

Mining Co. vs. Campbell, 17 Colo., 272.

Anderson, et. al., vs. Bartels, 7 Colo., 256.

Barringer and Adams, 415, *et seq.*

"A mining patent proves that the land is mineral, that the location is valid, that $500 have been expended for development, and that all things necessary were done."

Clark Min. L. Dig., p. 262; citing:

Beard vs. Federly, 3 Wall, 492.

Stark vs. Starr, 6 Wall, 482.

St. L. Smelting Co. vs. Kemp, 134 U. S., 636.

Eureka C. M. Co., vs. Richmond M. Co., 4. Saw., 302.

Clark's M. L. Dig., p. 417. and citations.

Says the Supreme Court of Colorado in the present case:

"As against a collateral attack, the action of the land department in issuing such patents conclusively settled that all steps necessary to constitute a valid location of these mining claims have been taken, which include the discovery of mineral. * * * It is contended on behalf of appellant that this principle is not applicable as between tunnel site and lode locations, because its rights were not involved in the

> patent proceedings. * * * We cannot understand how, upon any possible theory, the rule announced is not applicable as between a tunnel site location and a prior lode location upon which a patent has already issued. So long as the title to the claims of appellee was only evidenced by receiver's receipt, it was still subject to an attack in a way; but when patent finally issued upon these claims, it conclusively settled, as against the junior location of appellant's tunnel site, that all steps necessary to constitute a valid location of appellee's claims have been taken."

We have prolonged the argument upon this proposition more than was necessary. The patent of defendant in error was conclusive of the question here raised. The law does not permit its effect to be undermined and destroyed in the manner proposed.

We submit the case, firmly believing that the law is with us on all the points argued; that the judgment of the Supreme Court of Colorado is right; and that it will be promptly affirmed.

JOSEPH C. HELM,
For Defendant in Error.

ERNEST A. COLBURN AND
CHARLES H. DUDLEY,
Of Counsel.

Supreme Court of the United States.

No. 195.—October Term, 1900.

The Calhoun Gold Mining Company, Plaintiff in Error, *vs.* The Ajax Gold Mining Company.	In error to the Supreme Court of the State of Colorado.

[May 27, 1901.]

Mr. Justice McKenna delivered the opinion of the Court.

This action was brought in one of the District Courts of the State of Colorado by the defendant in error to recover damages from plaintiff in error for certain trespasses on, and to restrain it from removing ore from ground claimed to be within the boundaries of, the mining claims of defendant in error. The answer of plaintiff in error justified the trespasses and asserted a right to the ore by reason of the ownership of another mining claim and the ownership of a certain tunnel site.

The rights of the parties are based on and their determination hence involves the construction of the following sections of the Revised Statutes of the United States, empowering the location of mining claims:

"Sec. 2322. The locators of all mining claims heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical liens of his claim to enter upon the surface of a claim owned or possessed by another.

"Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnels shall have the right of

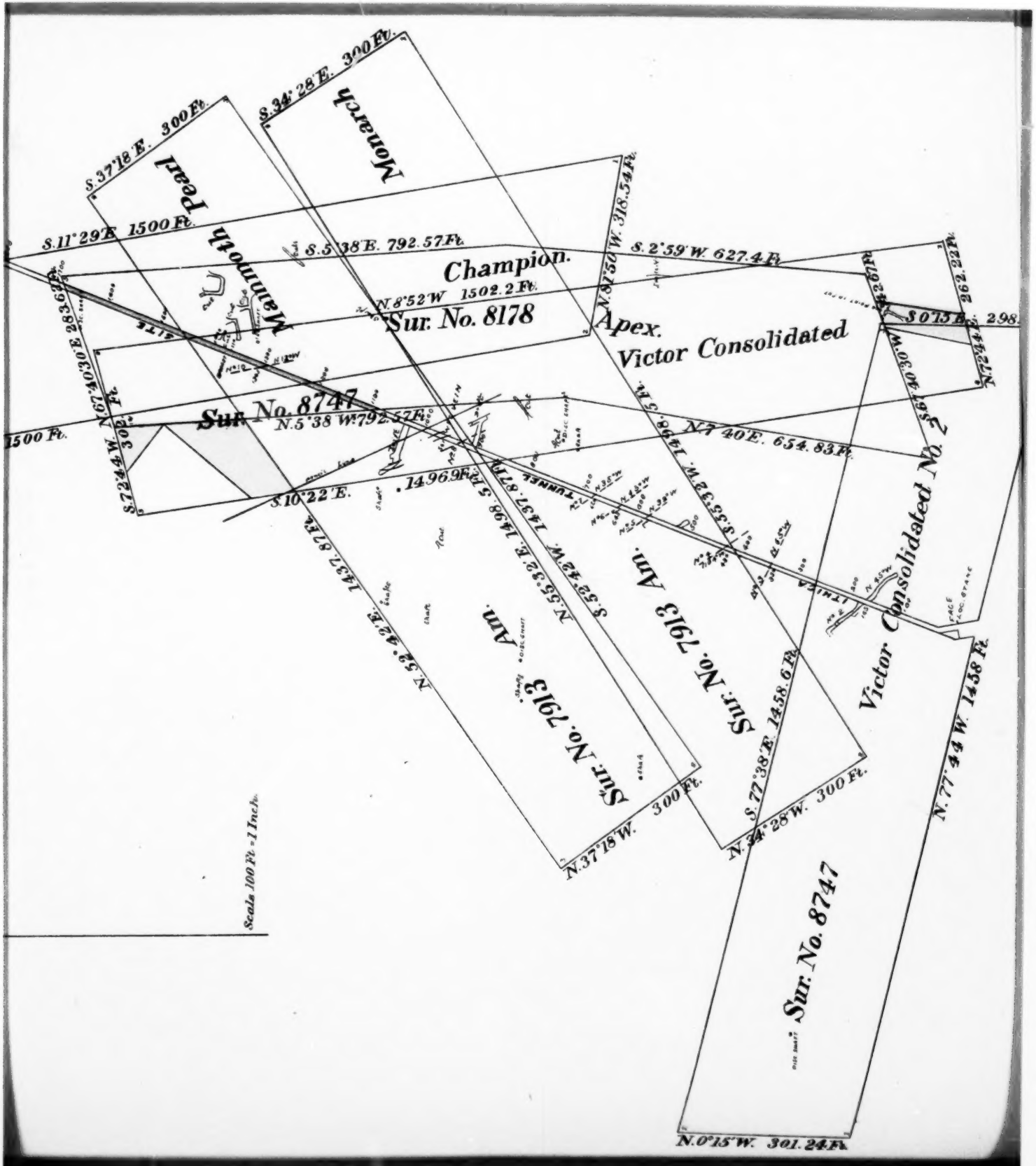
possession of all veins or lodes within three thousand feet from the face of such tunnel on the lines thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and location on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work of the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

"SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The especial controversy is whether the rights conferred by section 2322 are subject to the right of way expressed in section 2323 and limited by section 2336. Or, in other words, as to the latter section, whether by giving to the oldest or prior location, where veins unite, "all ore or mineral contained within the space of intersection," and "the vein below the point of union," the prior location takes no more, notwithstanding that section 2322 gives to such prior location "the exclusive right of possession and enjoyment of all the surface included within the lines" of the location, "and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error denied such effect to sections 2323 and 2336, and brought this suit, as we have said, against plaintiff in error for damages and to restrain plaintiff in error from removing ore claimed to be within the boundaries of the claims of defendant in error, to which ore defendant in error claimed to be entitled by virtue of section 2322. The judgment of the lower court sustained the claim of the defendant in error and damages were awarded it, and the plaintiff in error was enjoined from further prosecuting work. An appeal was taken to the Supreme Court of the State and the judgment was affirmed. Thereupon this writ of error was allowed.

The annexed plat exhibits the relative location of the respective properties of the parties. The Champion location was dropped from the case. There is no controversy as to the validity of the respective locations, none as to the tunnel site or of the steps necessary to preserve it. Indeed, the facts are all stipulated, and that the respective locations are evidenced by patents, the defendant in error being the owner of the Monarch and the Mammoth Pearl, and the plaintiff in error the owner of the Victor Consolidated and the tunnel site. The facts are stated by the Supreme Court of the State as follows:


Monarch
Pearl
Champion.
Sur. No. 8178
Apex.
Victor Consolidated
Victor Consolidated No. 2
Sur. No. 8747
Sur. No. 7913 Am.
Sur. No. 7913 Am.
Sur. No. 8747
S. 37°18' E. 300 Ft.
S. 34°28' E. 300 Ft.
S. 11°29' E. 1500 Ft.
S. 5°38' E. 792.57 Ft.
S. 2°59' W. 627.4 Ft.
N. 8°52' W. 318.54 Ft.
N. 8°52' W. 1502.2 Ft.
N. 5°38' W. 792.57 Ft.
S. 10°22' E. 1496.9 Ft.
N. 7°40' E. 654.83 Ft.
N. 37°18' W. 300 Ft.
N. 34°28' W. 300 Ft.
N. 77°44' W. 1458 Ft.
N. 0°15' W. 301.24 Ft.
Scale 100 Ft. = 1 Inch

"That each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on each of the claims of appellee issued prior to the location of the tunnel site and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins of the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of four hundred dollars removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithaca tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necesssary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithaca tunnel site, the blind veins discovered therein underneath the claims of appelleee, are vested in the appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl lode claims."

The assignments of error present the following propositions which it is stipulated the case involves and to which the decision may be directed:

"First. Whether or not the Ithaca tunnel (the tunnel claimed by plaintiff in error) is entitled to a right of way through defendant in error's lode claims.

"Second. Whether or not plaintiff in error has acquired by virtue of said tunnel site location the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

"Third. Whether or not plaintiff in error is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim, within the surface boundaries and across lode claims of defendant in error.

"Fourth. Whether or not plaintiff in error should have been allowed to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of defendant in error prior to the location of said tunnel site."

The third proposition involves the relation of sections 2322 and 2336. It is first discussed by plaintiff in error, and is given the most prominence in the argument and we, therefore, give it precedence in the order of discussion. It presents for the first time in this court the rights of a junior location of a cross vein within the side lines of a senior location under section 2336. Prior to the decision by the Supreme Court of Colorado in the case at bar that court had decided that the junior location was "entitled to all of the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins." *Branagan* v. *Dulaney*, (1885) 8 Col. 408; *Lee* v. *Stahl*, (1886) 9 Id. 208; *Margenson* v. *Middlesex M. & M. Co.*, (1887) 11 Col. 176; *Lee* v. *Stahl*, 13 Id. 174. In *Coffee* v. *Emigh*, (1890) 15 Col. 184, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is contended that the rule laid down by them became a rule of property in the State, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that which it "had reason to believe was a vested right in the Victor Consolidated vein."

There are serious objections to accepting that consequence as determinative of our judgment. We might by doing so confirm titles in Colorado but we might disturb them elsewhere. The statute construed is a Federal one, being a law not only for Colorado but for all of the mining States, and, therefore, a rule for all, not a rule for one, must be declared. Besides what consideration should have been given to prior cases, the Supreme Court of the State was better able to judge than we are. It may be that the repose of titles in the State was best effected by the reversal of the prior cases. At any rate, a Federal statute has more than a local application, and until construed by this court cannot be said to have an established meaning. The necessity of this is illustrated, if it need illustration, from the different view taken of sections 2322 and 2336 in California, Arizona and Montana, from that taken in the prior Colorado cases. The Supreme Courts respectively of those States and that Territory have adjudged a superiority of right to the cross veins to be in the senior location. Manifestly, on account of this difference if for no other, this court must interpret the sections independently of local considerations. And in doing so we do not find in the sections much ambiguity so far as the issue raised by the record is concerned; indeed, not even much necessity for explanation. Section 2336 does not conflict with section 2322, but supplements it. Section 2336 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the Supreme Courts of Cali-

fornia, Arizona and Montana, or through the space of intersection of the claims, as held by the Supreme Court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and more than that it is not necessary to decide on this record. A complete interpretation of the sections would, of course, determine between those views, but on that determination other rights than those submitted for judgment may be passed upon, and we prefer therefore to reserve our opinion.

There was some contrariety of views in the cases on other points. There was discussion as to whether veins cross on their strike or their dip, and it was held that they could cross on both strike and dip, but as to the exact application of section 2336 to either there was some disagreement.

The Supreme Court of Arizona said: "Congress had in mind, at the time of the enactment of the law of 1872, that, as mining rights then stood, A's lode might legally cross B's lode on the strike, and whether on the dip or not, makes no difference; and section 2336 was designed to define the rights of A and B in the space of intersection." (*Watervale Mining Co.* v. *Leach*, 33 Pac. Rep. 418.)

The Supreme Court of California held in *Wilhelm* v. *Silvester*, (101 Cal. 358,) that the provisions of the section could readily be construed as intending to protect the rights of old ledge locations. And speaking of veins intersecting on their dip, said, "moreover, there is strong reason for thinking that such an intersection was the very one in mind of Congress when it passed section 2336; for in that section, and speaking of the same subject, it says that 'where two or more veins *unite*, the oldest or prior location shall take the vein *below* the point of union,' and if the other kind of intersection (on the strike) was in the minds of the legislators at that time they would not have used the word 'below;' for 'below' would not apply at all to a union on the strike of two veins, such as the appellant's rights depend on in the case at bar." But the Chief Justice of the State, concurring in the result, observed:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of § 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins which intersect upon their strike without bringing it in conflict with the plain terms of § 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the State courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The Supreme Court of Colorado concurred in the conclusions of the courts of Arizona and California, and expressed its own view as follows:

"Our conclusion is that the provisions of § 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of viens either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and in so far as § 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of § 2322."

See for the views of the Supreme Court of Montana, *Pardee* v. *Murray*, (4 Mon. 234.)

2. The other assignments of error relate to rights claimed by plaintiff in error by the location of the tunnel site, and present the questions whether such location gave to the plaintiff in error the following rights: of way through the lode claims of the defendant in error, of possession of the blind veins cut by the tunnel underneath the claims of the defendant in error.

The plaintiff in error asserts the right of way for its tunnel under section 2323 by implication, and from that implication, and the rule it contends for as to cross veins, deduces its right to all of the blind veins. The contention as to cross veins we have answered, and the deduction as to blind veins is not justified. The section contemplates that tunnels may be run for the development of veins or lodes, for the discovery of mines, gives a right of possession of such veins or lodes, if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. There is no implication of a displacement of surface locations made before the commencement of the tunnel. Indeed, there is a necessary implication of their preservation. And there can be no implication of a conflict with the rights given by section 2322. The exclusiveness of those rights we have declared. The tunnel can only be run in subordination to them. How else can section 2322 be given effect? There are no exceptions to its language. The locators "of any mineral veins, lode or ledge" are given not only "an exclusive right of possession and enjoyment" of all the surface included within the lines of their locations, but *of all veins, lodes and ledges throughout their entire depth*, the top or apex of which lies inside of such surface lines extended downward vertically." A locator therefore is not confined to the vein upon which he based his location and upon which the discovery was made. "All veins or lodes having their apices within the plane of the surface lines extended downward are his, and possession of the surface is possession of all such veins or lodes within the prescribed limitations." (The Laws of Mines and Mining, page 44, by Barringer & Adams.)

Under the old law the miner "located the *lode*. Under the new (the act of 1872) he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top or apex of the vein. If he make such a location, containing the top or apex of his discovered lode, he will be entitled to all other lodes having their tops or apices within their surface boundaries." (Lindsay on Mines, sec. 71.)

And this court said, speaking by Mr. Justice Brewer, in *Campbell* v. *Ellet*, (167 U. S. 116):

"But the patent is not simply a grant of the vein, for, as stated in the section, 'a patent for any land claimed and located for valuable deposits may be obtained in the following manner.' It must also be noticed that section 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within the lines of their locations, and all veins, lodes and ledges, the tops or apices of which are inside such lines. So that a location gives to the locator something more than the right to the vein which is the occasion of the location." See also *Del Monte Mining Co.* v. *Last Chance Mining Co.*, (171 U. S. 55.)

The only condition is that the veins shall apex within the surface lines. It is not competent for us to add any other condition. Blind veins are not excepted, and we cannot except them. They are included in the description, "all veins" and belong to the surface location.

3. The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defendant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on the statutes of Colorado it is disposed of by their interpretation by the Supreme Court of Colorado, and, expressing it, the court said:

"It is contended by counsel for appellant that, under sec. 2338, Rev. Stat. U. S. and sec. 3141 Mills, it is entitled to such rights. The first of these sections provides that in the absence of necessary legislation by Congress the legislature of a State may provide rules for working mines involving easements, drainage and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills referred to provides that a tunnel claim located in accordance with its provisions shall have the right of way through lodes which may lie in its course, but it will be observed that this section only refers to tunnels located for the purpose of discovery, and if any of its provisions are still in force, which appears to be doubted in *Ellet* v. *Campbell*, *supra*, they can have no application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines, and the section of Mills relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of Congress, so that if appellant is entitled to the right claimed it must attach by virtue of some provision of this act."

4. An assignment of error is based upon an offer of plaintiff in error to prove, that at the time of the location of the Ithaca tunnel site, no ore had been discovered in two of the patented claims of the defendant in error, to wit, the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE